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A TREATISE

ON THE

LAW OF BAILMENTS AND CARRIERS

WITHDRAWN

BY

WILLIAM F. ELLIOTT

AUTHOR OF
"RAILROADS," "CONTRACTS"

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THE LAW OF BAILMENTS

CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES.

§ 1. Definition of bailment.
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3. Origin of the law of bailment.
4. Classification of bailments.
5. The consideration which supports the contract.
6. Principles common to all bailments and subject-matter of a bailment.
7. Parties to a bailment.
8. Delivery and acceptance of the property.
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10. Bailor's title and rights.
11. Bailee's estoppel to deny bailor's title.
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§ 13. Bailee's rights to use of property—Conversion.
14. Expenditures upon property bailed.
15. The bailor must not expose the bailee to danger.
16. Care to be taken of property bailed.
17. Bailee must act in good faith.
18. Effect of special contract.
19. Compound or mixed bailment.
20. Redelivery.
21. Termination of relation.
22. Form of action and burden of proof.
23. Distinction between bailment, and debt, sale or gift.

§ 1. **Definition of bailment.**—A bailment may be defined as a contract by which the possession of personal property is temporarily transferred from the owner to another for the accomplishment of some special purpose. There have been almost as many definitions of bailments as there have been writers upon the subject, but the one just given seems to be sufficiently definite and inclusive for the purposes of this article.[1]

[1] Among other definitions of bailments are the following: "Bailment consists in the rightful holding of a chattel by some party, under an obligation to return or deliver it over (or in certain instances hold as full owner), after some special purpose is accomplished." Schouler Bailments (3d ed.), § 2. "A bailment is a transfer of the possession of personal property, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the property is to be redelivered or delivered over to a third person." Hale Bailments, § 1. "A bailment is a con-

§ 2. **Character of the relation.**—A bailment relation is a contract relation, the contract often, however, being implied and not express. A bailment is a real contract, that is, a contract based upon a thing and the transfer of its possession, rather than a consensual agreement or contract based on mutual promises.[2] The term "bailment" comes from the Norman word "bailer", to deliver, and an actual, implied or constructive delivery of possession from the bailor of goods to the bailee and an actual, implied or constructive redelivery of such possession are elements essential to every bailment contract.[3]

tract relation resulting from the delivery of personal chattels by the owner, called the bailor, to a second person, called the bailee, for a specific purpose, upon the accomplishment of which the chattels are to be dealt with according to the owner's direction." Goddard Bailments, § 1. "A bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust." Story Bailments, § 2. "Bailment, from the French bailler, to deliver, is delivery of goods for some particular purpose, or on mere deposit, upon a contract express or implied, that, after the purpose has been performed, they shall be redelivered to the bailor, or otherwise dealt with according to his directions, or (as the case may be), kept till he reclaims them." Stephens Com. (1st Am. ed.) bk. 2, pt. 2, ch. 5, p. 129. Of these definitions probably that of Hale is the most satisfactory. Those of Story, Goddard and Stephens make delivery to the bailee essential, yet in case of the finder of lost property, who is by all writers recognized as a bailee, there can be said to be no delivery, save by the merest fiction of law, while in such a case there is certainly a transfer of possession and a rightful holding by the bailee. On the other hand, the definitions of Schouler and Hale perhaps overemphasize the element of redelivery, for in some cases the bailment may be retained by the bailee after the accomplishment of the special purpose, and in many cases it is not returned to the owner, so that it seems more exact to say that the property bailed must be disposed of as the owner directs than to say that it must be delivered to the owner, or to a third party. Under some of the definitions of bailments the consignment of goods to a factor for sale would not constitute a bailment, because there is no redelivery, and there has been some conflict in the past as to whether this is a bailment, but it seems that in all its essentials it is. The definition given in the text makes the foundation of the relation rather the severance of possession from ownership than the delivery or redelivery, yet we believe that so far as delivery by the owner or redelivery to him is essential, they are included in the temporary transfer of possession for some special purpose, for such transfer implies that the possession is to return to the owner after the special purpose has been accomplished. In Mr. Schouler's later work, Bailments Including Carriers (1905), § 1, he says that "bailment may be said in a broad sense to consist in rightful possession of a chattel severed from its ownership," and this is a very comprehensive and satisfactory definition.

[2] Street on Foundations of Legal Liability, vol. 2, ch. 1, p. 1, et seq., ch. 26, p. 251, et seq.

[3] Schouler Bailments (3d ed.), § 1; Van Zile Bailments (2d ed.), § 3; Goddard Bailments, § 11; Hale Bailments, p. 30. See Bates v. Bigby, 123 Ga. 727, 51 S. E. 717; Northcutt v. State, 60 Tex. Cr. 259, 131 S. W. 1128.

Only personal property can be the subject of a bailment, for actual manual possession of real property cannot be delivered, and under the civil law only corporeal personal property could be bailed, on the ground that it alone admitted of the actual delivery necessary to constitute a bailment, but under the common law incorporeal personalty, as debts or choses in action, may be bailed. In fact, the development of the law of bailment has been a transition from the theory of actual delivery and redelivery of corporeal chattels to the theory of the transfer for a special purpose of the possession of any kind of personal property, and to-day it can be said that the one distinguishing element of the bailment relation is the rightful temporary holding of the possession of personal property, by one not its owner.[4] Since the relation is one of contract, the general rules applicable to all contracts apply. A marked feature of the law of bailments is the fact that it consists almost wholly of duties arising between the parties by implication of law, almost all of which may be changed by express contract, and in perhaps no other branch of the law of contracts do we find so prominently the implied contract.[5] Likewise, as most contracts can be entered into by the agent of the contractor, the principles of agency apply to bailments, and this is especially true in reference to the law of carriers, since most of the carriers to-day are great corporations which can contract only by and through their agents.

§ 3. **Origin of the law of bailment.**—The modern law of bailment is to some degree a mingling of the Roman law and the common law, or rather, the grafting of Roman law terms upon common-law principles. The modern English law of bailment had its origin in the case of Coggs v. Bernard,[6] decided by Lord Holt in 1703, and all the present law of the subject has been a development of principles tentatively laid down by Lord Holt

[4] Street on Foundations of Legal Liability, vol. 2, 252; Schouler Bailments Including Carriers (1905), § 1. A contract between the parties is not necessary to a bailment, but it is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment. Burns v. State, 145 Wis. 373, 128 N. W. 987, 140 Am. St. 1081.

[5] Hale Bailments, p. 27.

[6] Coggs v. Bernard, 2 Ld. Raymond 909, 1 Smith Lead. Cas., 7th Am. ed. 369.

in that case. Sir William Jones in his Essay on Bailments and Justice Story in his work on bailments have had much to do with the development and classification of the principles underlying the subject.[7] Lord Holt and Sir William Jones introduced the classification of the Roman law as to the relations embraced in the subject of bailment, Justice Story introduced another classification based upon the doctrine of consideration, and the modern classification is a combination of the two, using names derived from the Roman classification for many of the classes, while not giving to the relations thus designated the full Roman signification.[8] A large portion of the law of bailments has been laid down by the text-writers in advance of actual decision from the courts, and for many of the principles referred to in this article, citation is made of the works of Story and Jones as repositories of the law.

§ 4. **Classification of bailments.**—The general classes of bailments are: 1. Gratuitous bailments, for the benefit of one of the parties to the bailment; and 2. Bailments upon consideration, for the mutual benefit of both parties. Gratuitous bailments are further subdivided: 1. Bailments for the benefit of the bailor alone, of which there are two kinds: Deposits, where the bailee takes a thing to be kept gratuitously for the bailor, and Mandates, where the bailee undertakes for the bailor gratuitously to perform work upon a thing, or to carry it from one place to another; and 2. Bailments for the benefit of the bailee alone, or Commodates, where the bailor gratuitously lends a thing to the bailee for his temporary use and enjoyment. Of Bailments upon consideration for mutual benefit, there are two main divisions: 1. Pledges (the Roman pignus or vadium), where the possession of a thing is delivered as security for the performance of an undertaking or obligation, or the payment of a debt; and 2. Contracts of hiring, where the bailee does something to the thing bailed in return for a reward. Of contracts of hiring there are

[7] Jones Essay on Bailments (1781); Story Bailments (1832).

[8] For the classification of bailments, see Van Zile Bailments (2d ed.), ch. 2; Street on Foundations of Legal Liability, vol. 2, ch. 27, pp. 271-4; Hale Bailments, pp. 35-7; Goddard Bailments, § 12; Schouler Bailments (3rd ed.), §§ 13, 14.

four classes, according to whether the bailor lets to the bailee the use of a thing (locatio rei), or hires the bailee to work upon a thing (locatio operis faciendi), or hires him to keep a thing (locatio custodiæ), or hires him to carry a thing from place to place (locatio operis mercium vehendarum), in these latter three the bailor hiring services about a chattel. And of contracts of carriage there may be contracts for the carriage of goods, or of passengers, or of live stock. Among the locatio or hiring contracts three species stand out as exceptional bailments, because of certain exceptional liabilities and duties imposed by law because of their peculiar situation, and these are postmasters, innkeepers and common carriers. In magnitude and importance the subject of carriers at the present day overshadows all the other subjects in the classification of bailments.

§ 5. **The consideration which supports the contract.**— Under the common law every contract not under seal must be supported by a consideration, while under the civil law, from which we in part derive our law of bailments, such was not in all instances necessary.[9] In the cases of bailments for mutual benefit, it is at once apparent that the contract is supported by a consideration moving from each side. Where the bailment is a commodate, the benefit accruing to the bailee is sufficient consideration to hold him to the legal obligation of his contract, but it is not so easy to see what consideration binds the gratuitous bailee for the benefit of the bailor in a deposit or mandate. However, it is settled that the delivery of the property into the bailee's care, which is a detriment to the bailor in that it deprives him of the possession of his property and some rights connected therewith, is a sufficient consideration for the bailee's contract, if he accepts the goods. It is said that the confidence reposed in the bailee by the bailor is a sufficient consideration, or in the words of Lord Holt in Coggs v. Bernard, "the owner trusting him [the bailee]

[9] In a real contract under the civil law a duty attached under the law, without aid from a promise which must be supported by a consideration. The action in cases of bailment was in early English days that of debt, rather than assumpsit. See Street on Foundations of Legal Liability, vol. 2, p. 270, vol. 2, ch. XXVI; Coggs v. Bernard, 2 Ld. Raym. 909.

with the goods is a sufficient consideration to oblige him to a careful management."[10]

§ 6. **Principles common to all bailments and subject-matter of a bailment.**—There are certain well-established principles of law which are applicable to all of the various classes of bailments, as well as certain essential elements common to all bailments, and it will be the aim of the sections next succeeding to briefly discuss these principles and elements. The subject-matter of a bailment is always personal property. It may be corporeal or incorporeal.[11] Real estate cannot be the subject of a bailment.[12] When one by contract transfers the possession of realty to another, while retaining ownership, the relation created, though to a certain extent similar to that of bailor and bailee, is that of landlord and tenant. In fact, the distinction between the relations is one rather artificial than actual, but from its inception the law of bailments has been confined to personal property.

§ 7. **The parties to a bailment.**—The parties to a bailment are called the bailor and the bailee. The bailor is the party from whose possession the property is transferred for the accomplishment of the special purpose of the bailment, and the bailee is the party into whose possession such transfer for such purpose is made. It is not necessary that the bailor should be the owner, but simply that he have possession of the property, nor is it necessary that his possession should be lawful.[13] If a bailment is made by one entitled only to the possession of the property, it is, of course, liable to be defeated in its purpose by the exercise of the paramount rights of the owner. Where a bailment is made by an express contract, the capacity of the par-

[10] Coggs v. Bernard, 2 Ld. Raym. 909; Clark v. Gaylord, 24 Conn. 484; McCauley v. Davidson, 10 Minn. 418, Gilfillan 335; Kincheloe v. Priest, 89 Mo. 240, 58 Am. Rep. 117. See Young v. Noble, 2 Disney (Ohio) 485; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574n.

[11] Loomis v. Stave, 72 Ill. 623; Jarvis v. Rogers, 15 Mass. 389; White v. Phelps, 14 Minn. 27, 100 Am. Dec. 190; McLean v. Walker, 10 Johns. (N. Y.) 471; Appleton v. Donaldson, 3 Pa. St. 381. Any kind of personal property, including current money, and even a chose in action, if in existence, may be the subject of a bailment. Van Wagoner v. Buckley, 133 N. Y. S. 599.

[12] Williams v. Jones, 3 H. & C. 256; Coupledike v. Coupledike, Cro. Jac. 39. See Dewey v. Bowman, 8 Cal. 145.

[13] Van Zile Bailments (2d ed.), § 11.

ties to contract is governed by their competency to enter into an ordinary contract, and infants, lunatics or married women, except where their disabilities have been removed by statute, can no more enter into a bailment contract than any other contract.[14] However, as has often been said, this disability is to be used as a shield, and not as a sword, and while persons under a disability are not liable for a breach of their contract, yet, having once come into the possession of goods, they are liable in tort for their conversion, and a departure from the purposes of the bailment is usually held a conversion.[15] An infant may make a contract as bailor, which will be binding on the bailee until the infant repudiates it, or recalls the property bailed.[16] Under the common law the contract of a married woman with respect to a bailment is absolutely void.[17] But where one under a disability becomes in such a situation that the law would imply the bailment relation to exist, as if such a one finds lost property, then he is held to the care of a bailee in regard to the property.[18] A corporation acting within its corporate authority may be a bailor or bailee.[19]

§ 8. **Delivery and acceptance of the property.**—It is essential to the existence and the inception of the bailment relation that there should be a delivery of the thing bailed, or something which takes the place of delivery. Delivery may be actual, constructive or by operation of law. Delivery is actual where the bailor makes a manual transfer of the property to the bailee, as where shoes are left with a cobbler for repairs, or a package de-

[14] Fetrow v. Wiseman, 40 Ind. 148; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Illinois Land &c. Co. v. Bonner, 75 Ill. 315; Hagebush v. Ragland, 78 Ill. 40; Scanlan v. Cobb, 85 Ill. 296; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; Shoulters v. Allen, 51 Mich. 529, 16 N. W. 888; Owen v. Long, 112 Mass. 403; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496.

[15] Mills v. Graham, 1 Bos. & P. 140; Homer v. Thwing, 3 Pick. (Mass.) 492; Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340; Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519. See Clark Contracts (1894), p. 261.

[16] Story Bailments, § 50; Schouler Bailments (3d ed.), § 27.

[17] Clark Contracts (1894), p. 276.

[18] Van Zile Bailments (2d ed.), § 12.

[19] Lehman Bros. v. Tallassee Mfg. Co., 64 Ala. 567; Combination Trust Co. v. Weed, 2 Fed. 24; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Chouteau v. Allen, 70 Mo. 290; Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190; Lloyd v. West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

livered to an expressman, or an umbrella loaned to a friend. Constructive delivery arises when, on account of circumstances or the nature of the property, manual delivery is impossible or useless, but from the circumstances there may be implied an intention of the person in possession to act as bailee for another.[20] So, where a vendor holds goods after a sale, he is by constructive delivery the bailee of such goods for the vendee,[21] or where after a contract of hiring is terminated the hirer retains the property for the benefit of the bailor, a new bailment is created without actual change of possession.[22] Delivery by operation of law takes place when lost goods are found, or goods seized under legal process, the finder or the officer being a bailee by operation of the law, and not because the owner has consented to their delivery to him.[23] A delivery may be made to the servant or agent of the bailee.[24] Delivery is not complete without acceptance by the bailee, and even though one may involuntarily become a bailor, he can not be charged as a bailee unless he voluntarily takes possession of the goods, even in case of the finder of lost property.[25] But it is said that where one knowingly holds possession of another's goods, he is liable as a bailee, and if he finds the goods of another in his possession and does not know how he obtained possession, he is held as a baliee after he obtains notice.[26] Although one may not be made a bailee against his will,[27]

[20] Story Bailments (9th ed.), § 55; Blake v. Kimball, 106 Mass. 115; Tuxworth v. Moore, 9 Pick. (Mass.) 346; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Dillenback v. Jerome, 7 Cow. (N. Y.) 294. See King v. Jarman, 35 Ark. 190, 37 Am. Rep. 11, and note; Sherman v. Hicks, 14 N. Mex. 439, 94 Pac. 959.

[21] Oakley v. State, 40 Ala. 372. So where the purchaser of goods shipped them back to the seller without any notification, or any previous agreement, and the seller stored the goods to protect them, the seller became a gratuitous bailee for the buyer, and the buyer was liable to him for necessary storage charges actually paid. Smith v. F. W. Heitman Co., 44 Tex. Civ. App. 358, 98 S. W. 1074.

[22] Macomber v. Parker, 14 Pick. (Mass.) 497.

[23] Goddard Bailments, § 4.

[24] Boynton v. Payrow, 67 Maine 587; Brown v, Warren, 43 N. H. 430; City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Lloyd v. Barden, 3 Strob. (S. Car.) 343; McCready v. Haslock, 3 Tenn. Ch. 13. See Baker & Lockwood Mfg. Co. v. Clayton, 40 Tex. Civ. App. 586, 90 S. W. 519.

[25] Goddard Bailments, § 5. One who finds a thing is not compelled to take possession of it, but if he does so voluntarily he is held by the law to the care of a depositary. See Vandrink v. Archer, 1 Leon. 221; Dougherty v. Posegate, 3 Iowa 88, Cory v. Little, 6 N. H. 213, 25 Am. Dec. 458.

[26] Hale Bailments, § 2; Wolf v. Shannon, 50 Ill. App. 396; Jones v. Maxwell, 1 Lack. Leg. N. (Pa.) 191.

[27] Cory v. Little, 6 N. H. 213, 25

yet as an agreement between the parties is not necessary to create a bailment, and it may arise by operation of law, a taking possession of personal property without a present intent to appropriate it may bring into being all the contractual elements essential to a bailment; as where a lunatic throws away a roll of money while being pursued and one of the pursuers picks it up and gives it to a constable who takes the lunatic in custody, the constable is a bailee of the money.[28]

§ 9. **Possession of the property.**—As we have seen, the characteristic of the bailment relation is that the possession of the property bailed, without title thereto, is in the bailee, and it is essential to the existence of the relation that the bailee have possession. During the accomplishment of the special purpose of the bailment the bailee has the right of possession against the bailor, so long as the bailee himself is not in default in the conditions of the contract.[29] But the bailee has no title, by an unauthorized sale cannot convey title to an innocent purchaser, can in no event convey more than his own interest, and cannot subject the property bailed to a lien.[30]

§ 10. **The bailor's title and rights.**—While the bailee has the right of possession, he can never hold the general title while the relation of bailment continues, for a man cannot be a bailee for himself. The right of property remains in the bailor, if he be the owner; if not, it remains in the true owner.[31] The owner may

Am. Dec. 458; Lloyd v. West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

[28] Burns v. State, 145 Wis. 373, 128 N. W. 987, 140 Am. St. 1081.

[29] Simpson v. Wrenn, 50 Ill. 222; Burdict v. Murray, 3 Vt. 302, 21 Am. Dec. 588.

[30] Boozer v. Jones, 169 Ala. 481, 53 So. 1018; Clay v. Sullivan, 156 Ala. 892, 47 So. 153; Robinson v. Haas, 40 Cal. 474; Newton v. Cardwell &c. Co., 41 Colo. 492, 92 Pac. 914; Leffler v. Watson, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467; Small v. Robinson, 69 Maine 425, 31 Am. Rep. 299; Sowden v. Kessler, 76 Mo. App. 581; Heisley v. Economy Tool Mfg. Co., 33 Pa. Super. Ct. 218; Barnett v. Fein, 41 Pa. Super. Ct. 423; Woodward v. San Antonio Tr. Co. (Tex. Civ. App.), 95 S. W. 76; Cases cited in note, 25 L. R. A. (N. S.) 776. Where the conditional vendee of property bails it for its improvement by work and labor thereon, no liability is created against the vendor or the property. Baughnan Automobile Co. v. Emanuel, 137 Ga. 354, 73 S. E. 511.

[31] See Story Bailments (9th ed.), § 93; Henry v. Patterson, 57 Pa. St. 346; Pritchett v. Cook, 62 Pa. St. 193; Northcutt v. State, 60 Tex. Cr. App. 259, 131 S. W. 1128; The Laflin & Rand Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. ed. 973.

transfer the title and the right of property while the bailment is in the bailee's possession, subject to the bailee's rights, and without the bailee's consent; and if the bailee knows of such transfer of title he must hold the property as against attaching creditors of the bailor, or a claimant as bona fide purchaser.[32] And where the bailor's right of property carries with it the right of possession, he may maintain replevin against one who is wrongfully in possession of the property bailed.[33]

§ 11. **The bailee's estoppel to deny the bailor's title.**—"A bailee shall never be permitted to controvert the bailor's title, or set up against him a title acquired by himself during the bailment, which is hostile to, or inconsistent in character with, that which he acknowledged in accepting the bailment."[34] And if the bailee owns the paramount title but receives possession from the bailor under a bailment contract he is estopped to deny the bailor's title until there has been a redelivery.[35] But this estoppel is only as to title at the time of bailment and the bailee may show that since the bailment the title has been assigned to an-

[32] Riddle v. Blair, 148 Ala. 461, 42 So. 566; Hodges v. Hurd, 47 Ill. 363; Erwin v. Arthur, 61 Mo. 386; Gerber v. Monie, 56 Barb. (N. Y.) 652.

[33] Walker v. Wilkinson, 35 Ala. 725, 76 Am. Dec. 315; Cannon v. Kinney, 3 Scam. (Ill.) 9; Root v. Shandler, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546; Estey Co. v. Dick, 41 Pa. Super. Ct. 610; Burdict v. Murray, 3 Vt. 302, 21 Am. Dec. 588; Strong v. Adams, 30 Vt. 221, 73 Am. Dec. 305. If the bailor has the right to possession at any time, he may maintain trespass against a third person for injury to the property. Bradley v. Davis, 14 Maine 44, 30 Am. Dec. 729; Staples v. Smith, 48 Maine 470; Walcot v. Pomeroy, 2 Pick. (Mass.) 121. But if the bailment is for a definite time, the bailor cannot maintain trespass, since he has no right to possession until the expiration of the time. Hume v. Tufts, 6 Blackf. (Ind.) 136; Lunt v. Brown, 13 Maine 236; Walcot v. Pomeroy, 2 Pick. (Mass.) 121; Wilson v. Martin, 40 N. H. 88.

[34] Jensen v. Eagle Ore Co., 47 Colo. 306, 107 Pac. 259, 33 L. R. A. (N. S.) 681 and note. See also, Riddle v. Blair, 148 Ala. 461, 42 So. 560; Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Barker v. S. A. Lewis &c. Co., 79 Conn. 342, 65 Atl. 143, 118 Am. St. 141; Simpson v. Wrenn, 50 Ill. 222, 99 Am. Dec. 511; Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Hendricks v. Mount, 5 N. J. L. 738, 8 Am. Dec. 623; First Nat. Bank v. Mason, 95 Pa. St. 113, 40 Am. Rep. 632; In re "The Idaho," 93 U. S. 575, 23 L. ed. 978; Nudd v. Montanye, 38 Wis. 511, 20 Am. Rep. 25.

[35] Pepper v. James, 7 Ga. App. 518, 67 S. E. 218; Simpson v. Wrenn, 50 Ill. 222; Thompson v. Williams, 30 Kans. 114, 1 Pac. 47; Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 433n; Osgood v. Nichols, 5 Gray (Mass.) 420; Bricker v. Stroud Bros., 56 Mo. App. 183; Hampton v. Swisher, 4 N. J. L. 73. See H. C. Porter Co. v. Boyd, 171 Fed. 305, 96 C. C. A. 197.

other.[36] The purchaser from the bailor may assert the principle that the bailee cannot deny his bailor's title.[37] If the bailor is not the true owner and the true owner demands the property from the bailee, he is liable for failure to deliver to such owner, and delivery to the true owner is an excuse for failure to redeliver to the bailor.[38] If the property was taken from the bailor by regular process of law, he is excused from redelivery.[39] And it is held that a purchaser from the bailee is not estopped to assert such title against the bailor.[40]

§ 12. **Bailee's rights against third parties.**—Since the bailee is entitled to the possession of the property bailed, he has a right to protect that possession against third parties. So he may bring replevin for its possession, or trover for its value where it is so destroyed or injured that the benefits of possession are lessened.[41] Likewise he has a special interest to the extent of his rights under the bailment contract and may sue wrongdoers

[36] Kingsman v. Kingsman, 6 Q. B. Div. 122; Cole v. Wabash, St. L. & P. R. Co., 21 Mo. App. 443; Gruel v. Yetter, 27 Misc. (N. Y.) 494, 58 N. Y. S. 373; Burnett v. Fulton, 48 N. Car. 486. The bailee when sued for conversion is not estopped from showing that the title held by the bailor at the time of bailment has since that time been acquired by himself or passed to another. Shellhouse v. Field (Ind. App.), 97 N. E. 940.

[37] Riddle v. Blair, 148 Ala. 461, 42 So. 560.

[38] Davis v. Donahoe-Kelly Banking Co., 152 Cal. 282, 92 Pac. 639; Fisher v. Bartlett, 8 Greenl. (Maine) 122, 22 Am. Dec. 225; Mullins v. Chickering, 110 N. Y. 513, 18 N. E. 377, 1 L. R. A. 463; King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Rosenfield v. Express Co., 1 Woods (U. S.) 131, 20 Fed. Cas. No. 12060; In re "The Idaho," 93 U. S. 575, 23 L. ed. 978. Or if the true owner makes a demand, the bailee may attorn to him by agreeing to hold the property for him, and may set up his demand, paramount title and attornment as an excuse for not redelivering to the bailor. Biddle v. Bond, 6 B. & S. 225, 118 E. C. L. 225; Dixon v. Yates, 5 B. & Ad. 313, 27 E. C. L. 137; Hayden v. Davis, 9 Cal. 573; Pepper v. James, 7 Ga. App. 518, 67 S. E. 218; Atlantic &c. R. Co. v. Spires, 1 Ga. App. 22, 57 S. E. 973; Hastings v. Allen, 14 Ohio 58, 45 Am. Dec. 522.

[39] Ohio &c. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Fite v. Briedenback, 32 Ky. L. 400, 105 S. W. 1182; French v. Star Union Transp. Co., 134 Mass. 288; Schrauth v. Dry Dock Sav. Bank, 86 N. Y. 390; Bliven v. Hudson R. Co., 36 N. Y. 403; Stiles v. Davis, 1 Black (U. S.) 101, 17 L. ed. 33.

[40] McFerrin v. Perry, 1 Sneed (Tenn.) 314.

[41] Armory v. Delamirie, 1 Strange 505, 1 Smith Lead. Cas. 679; Atkins v. Moore, 82 Ill. 240; Little v. Fossett, 34 Maine 545, 56 Am. Dec. 671; Harrington v. King, 121 Mass. 269; Chamberlain v. West, 37 Minn. 54, 33 N. W. 114; Baggett v. McCormack, 73 Miss. 552, 19 So. 89, 55 Am. St. 554; Vermillion v. Parsons, 101 Mo. App. 602, 73 S. W. 994. When the bailor recovers a judgment against the bailee for the value of the goods, and also has possession of them, the bailee, upon satisfaction of the judgment, acquires the property in the

who have lost the property or injured it,[42] or if he has an interest under an express contract may recover for the negligent destruction of the property by third parties.[43] As a rule, he may recover the entire damages, and is held as a trustee for the bailor as to the excess above his interest.[44]

§ 13. **Bailee's right to use of property—Conversion.**—The bailee has no right to use the bailed property unless it is given him by contract, or unless the owner's assent would be presumed; and he is not only liable for a breach of the contract for a misuse of the article bailed, but "The general rule is that if a bailee having authority to use a chattel in a particular way uses it in a different way or to a greater extent than authorized, such unauthorized use is a conversion of the chattel for which the bailor may maintain a trover for its value."[45] It is, as a rule, a question of circumstances as to whether the use was authorized, in the absence of any contract on the subject of the use, and the following tests may be used as applicable. One is to consider whether from the circumstances the owner's assent would be presumed, and this is generally done where the use is beneficial to the property, but not so when it is not. It is the duty of the bailee to use the property so far as necessary for its preservation, as to milk a cow, and to give a horse reasonable exercise. Also, if the property is of such a character that it requires expense to keep it, it is said the bailee may use it reasonably to compensate

goods, and may bring replevin against the bailor and recover them. Bauer v. Hess, 76 N. J. L. 257, 69 Atl. 966.

[42] Hare v. Fuller, 7 Ala. 717; Knight v. Davis Carriage Co., 71 Fed. 662, 18 C. C. A. 287; Atlantic Coast Line R. Co. v. Partridge, 58 Fla. 153, 50 So. 634; Peoria P. & J. R. Co. v. McIntire, 39 Ill. 298; Little v. Fossett, 34 Maine 545, 56 Am. Dec. 671; Wilkes v. Southern R. Co., 21 Ann. Cas. 79, 85 S. Car. 346; 67 S. E. 292; Godfrey v. Pullman Co., 87 S. Car. 361, 69 S. E. 666, Ann. Cas. 1912B 971. See Central R. of New Jersey v. Buyway Refining Co., 81 N. J. L. 456, 79 Atl. 292, Ann. Cas. 1912 D 77 and note.

[43] Union Pacific R. Co. v. Meyer, 76 Nebr. 549, 107 N. W. 793, 14 Ann. Cas. 634, and note, citing many cases in which a bailee has recovered for injuries to or the loss of such property caused by the acts of persons other than the owner.

[44] Walsh v. United States Tent &c. Co., 153 Ill. App. 229; McCrossan v. Reilly, 33 Pa. Super. Ct. 628.

[45] Cartlidge v. Sloan, 124 Ala. 596, 26 So. 918. See also, Bryant v. Wardell, 2 Exch. 479; Columbus v. Howard, 6 Ga. 213. See note to McCurdy v. Wallblom Furniture & Carpet Co., 94 Minn. 326, 102 N. W. 873. To the same effect, Haines v. Chappell, 1 Ga. App. 480, 58 S. E. 220; Raynor v. Sheffler, 79 N. J. L. 340, 75 Atl. 748. The bailee is liable in tort for con-

him for the charge of keeping.[46] But none of these tests furnishes an absolute rule. It has been held that the bailee of a slave may make a reasonable use of his services,[47] and the same rule has been applied to the bailee of a horse.[48] An unauthorized sale by the bailee is a conversion, and is void as to the owner.[49] So a wrongful delivery or a failure to redeliver may be a conversion.[50] The destruction of property under hire by the bailee is a conversion.[51]

§ 14. **Expenditures upon property bailed.**—In the absence of a special contract, the ordinary expenses incurred in the care of a chattel bailed must be borne by the bailee, but extraordinary expenses, such as those which become necessary in an emergency to protect the property, as for instance a veterinary surgeon's services for a sick horse, must be paid for by the bailor, the bailee being held the agent of the bailor to do whatever is necessary to preserve the goods and for this purpose to bind him by a contract with third persons.[52] In fact, the bailor is liable for all reasonably necessary expenses which are not connected with the benefit to the bailee to be obtained from the accomplishment of the bailment purpose, but which are connected with the necessary care of the property for the owner.[53] The bailee is liable for expenses caused by his own default.[53a]

§ 15. **The bailor must not expose the bailee to danger.**—If the bailor knows, or in the exercise of reasonable diligence

version. Palmer v. Mayo, 80 Conn. 353, 68 Atl. 369, 15 L. R. A. (N. S.) 428; Farkas v. Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397; Hains v. Chappell, 1 Ga. App. 480, 58 S. E. 220; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Hanson v. Skogman, 14 N. Dak. 445, 105 N. W. 90; Carney v. Rease, 60 W. Va. 676, 55 S. E. 729.

[46] Alvord v. Davenport, 43 Vt. 30.

[47] Farrow v. Bragg's Admr., 30 Ala. 261; Rand v. Oxford, 34 Ala. 474.

[48] Coggs v. Bernard, 2 Ld. Raym. 909; Kennet v. Robinson, 2 J. J. Marsh. (Ky.) 84.

[49] Taylor v. Welsh, 138 Ill. App. 190; Schwartz v. Clark, 136 Ill. App. 150.

[50] Murry v. Postal Tel. &c. Co., 210 Mass. 188; 96 N. E. 316; Alton v. New York Taxicab Co., 66 Misc. (N. Y.) 191, 121 N. Y. S. 271. See cases cited in § 3005.

[51] Kiskadden v. United States, 44 Ct. Cl. (U. S.) 205.

[52] Leach v. French, 69 Maine 389, 31 Am. Rep. 296; Harter v. Blanchard, 64 Barb. (N. Y.) 617.

[53] Fagan v. Thompson, 38 Fed. 467; Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. 624.

[53a] Cullen v. Lord, 39 Iowa 302.

could know, of anything about the thing bailed which would be liable to cause injury to the bailee, he is liable for injury caused by his failure to inform him, unless the defects are open and patent to the bailee. Thus the bailor of an animal for hire is bound to disclose vicious propensities which are directly dangerous, if he knows of them.[54] Since in cases of gratuitous bailments the benefit is exclusively to the bailee, the liability of the bailor for defects in the thing loaned is only for those which he knows but does not communicate to the bailee, and he is not liable for injuries caused by defects of which he does not know.[55]

§ 16. **Care to be taken of the property bailed.**—The care which should be given by the bailee to the property bailed is almost entirely dependent upon the circumstances of the bailment.[56] But the general rule is that the diligence required by the bailee is dependent upon the benefit derived from the bailment. Thus, where the bailment is gratuitous, for the benefit of the bailor, the bailee is held to only a slight degree of diligence;[57] where the bailment is one for mutual benefit, he must use ordinary diligence, that is, such diligence as an ordinarily prudent man under similar circumstances uses in the conduct of his own affairs of similar nature;[58] where the bailment is gratuitous,

[54] Emmons v. Stevane, 77 N. J. L. 570, 73 Atl. 544 (one hiring board for a dog); Kissam v. Jones, 56 Hun (N. Y.) 432, 31 N. Y. St. 198, 10 N. Y. S. 94; Conn v. Hunsberger, 224 Pa. St. 154, 73 Atl. 324, 25 L. R. A. (N. S.) 372, 132 Am. St. 770 (a livery stable keeper who lets a horse for hire).

[55] Robideaux v. Hebert, 118 La. 1089, 43 So. 887, 12 L. R. A. (N. S.) 632; Gagnon v. Dana, 69 N. H. 264, 39 Atl. 982, 41 L. R. A. 389, 76 Am. St. 170.

[56] Hale Bailments, p. 23; 2 Jaggard Torts 900; Netzow Mfg. Co. v. Southern R. Co., 7 Ga. App. 163, 66 S. E. 399; Pennsylvania R. Co. v. O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Meredith v. Reed, 26 Ind. 334; Lane v. Boston & A. R. Co., 112 Mass. 455; Barnum v. Terpenning, 75 Mich. 557, 42 N. W. 967; Hall v. Chicago B. & N. R. Co., 46 Minn. 439, 49 N. W. 239; McAdoo v. Richmond & D. R. Co., 105 N. Car. 140, 11 S. E. 316; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. 679.

[57] Davis v. Gay, 141 Mass. 53, 6 N. E. 549; Gerish v. Savings Bank, 138 Mich. 46, 100 N. W. 1000; Hibernia Bldg. Assn. v. McGrath, 154 Pa. St. 296, 26 Atl. 377, 35 Am. St. 828; Whitney v. First Nat. Bank, 55 Vt. 154, 45 Am. Rep. 598. Compare Levi v. Missouri &c. R. Co., 157 Mo. App. 536, 138 S. W. 699.

[58] Fairmount Coal Co. v. Jones & Adams Co., 134 Fed. 711, 67 C. C. A. 265; Morris &c. Co. v. Wilkes, 1 Ga. App. 751, 58 S. E. 232; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828n, 115 Am. St. 114; Hunter v. Ricke, 127 Iowa 108, 102 N. W. 826; Woodruff v. Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. 786; Gleason v. Beers' Estate, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757. For definition of ordinary diligence see Cloyd v. Steiger, 139 Ill. 41, 28 N. E.

for the benefit of the bailee, he must use great diligence.[59] It will be seen from the definitions given of ordinary diligence that this is dependent upon the circumstances of the case and may vary greatly under different conditions.[60] Slight diligence may perhaps be said to be the diligence shown in their own affairs by men who are not ordinarily prudent, but who take some care of their affairs,[61] and great diligence to be that diligence shown by men of ordinary prudence in affairs of their own to which they give especial care.[62] It would probably be better to abandon the terms "slight," "ordinary" and "great diligence" entirely, and to state as the rule applicable that the bailee is held to reasonable care under

987; Ray's Admrs. v. Bank of Kentucky, 10 Bush (Ky.) 344; Wood v. Remick, 143 Mass. 102, 9 N. E. 831; Maynard v. Buck, 100 Mass. 40; Ruggles v. Fay, 31 Mich. 141; Swentzel v. Bank, 147 Pa. St. 140, 23 Atl. 405, 15 L. R. A. 305n, 30 Am. St. 718; First Nat. Bank of Carlisle v. Graham, 79 Pa. St. 106, 21 Am. Rep. 49. For full discussion of liability of bailee for hire, see Firemen's Fund Ins. Co. v. Schreiber (Wis.), 135 N. W. 507.

[59] Hagebush v. Ragland, 78 Ill. 40; Wood v. McClure, 7 Ind. 155; Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680.

[60] Judge Story says (Story on Bailments [9th ed.], § 15): "What constitutes ordinary diligence may also be materially affected by the nature, the bulk, and the value of the articles. A man would not be expected to take the same care of a bag of oats as of a bag of gold; of a bale of cotton as of a box of diamonds or other jewelry; of a load of common wood as of a box of rare paintings; of a rude block of marble as of an exquisite sculptured statue. The value, especially, is an important ingredient to be taken into consideration upon every question of negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which in the case of a common parcel would not be so. The degree of care which a man may reasonably be required to take of anything must, if we are at liberty to consult the dictates of common sense, essentially depend upon the quality and value of the thing, and the temptation thereby afforded to theft. The bailee, therefore, ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." Mr. Hale says, "The influence of custom and business must also be considered in determining what is ordinary diligence, as, in certain trades, dispositions may be made of goods by a man of ordinary prudence which under other circumstances would certainly be open to the charge of great negligence." Hale Bailments, p. 26. Mr. Van Zile says, "To the circumstances and conditions important in determining diligence or negligence in caring for the subject of the bailment, noted by Judge Story, might be added, the season of the year, the climate of the country, the time and place of doing the business; all these would be important elements to be considered." Van Zile Bailments (2d ed.), § 42. See Erie Bank v. Smith, 3 Brewst. (Pa.) 9.

[61] Story Bailments (9th ed.), § 16; Jones Bailments, 8; Goddard Bailments, § 16; Vaughan v. Menlove, 3 Bing. N. Cas. 468; Tompkins v. Saltmarsh, 14 Serg. & R. (Pa.) 275.

[62] Hale Bailments, p. 27; Scranton v. Baxter, 4 Sandf. (N. Y.) 5; Hagebush v. Ragland, 78 Ill. 40; Wood v. McClure, 7 Ind. 155; Cullen v. Lord, 39 Iowa 302.

the circumstances of the case, for it is reasonable that the bailee who undertakes a gratuitous deposit or mandate should not be held to as high a degree of care as the one who undertakes for a compensation to perform the same kind of services, and certainly it is reasonable that one to whom an article is loaned for his own use gratuitously should be held to a higher degree of care than if he were hiring the use of the article, since in the latter case the bailor could not expect any higher care than he himself would ordinarily give to the article bailed, for it is in his service, as well as the bailee's. But where a loan is made of an article for the benefit of the bailee, the relation is almost that of a debt, and the bailee should be held to a degree of care so high that little, if anything, short of unavoidable accident or a cause entirely beyond his control, should excuse him for loss or injury to the property which occurs while it is in his possession. Innkeepers and common carriers are held to an extraordinary degree of care as to property bailed to them, which will be discussed later. The bailee is liable for loss or injury to the property caused by his failure to use the care demanded by the circumstances, but, ordinarily, in the absence of his negligence in this respect, the bailor must bear any loss occurring to the subject of the bailment while the bailment relation exists.[63]

§ 17. **Bailee must act in good faith.**—In addition to exercising the due amount of care commensurate with the circumstances of the bailment, the law requires the bailee to act with honesty and good faith in carrying out the purpose of the bailment. He cannot sell or pledge the property or create a lien thereon as if he were the owner, and, as we have seen, may not assert title in himself against his bailor, nor use the property in an unauthorized manner, nor in any way is he allowed to deal with the goods so as to injure the owner.[64]

[63] Abraham v. Nunn, 42 Ala. 51; Watkins v. Roberts, 28 Ind. 167; Wood v. McClure, 7 Ind. 155; McGinn v. Butler, 31 Iowa 160; Levy v. Bergeron, 20 La. Ann. 290; Chenowith v. Dickinson, 8 B. Mon. (Ky.) 156; Cass v. Boston &c. R. Co., 14 Allen (Mass.) 448; Beller v. Schultz, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280; Baker &c. Co. v. Clayton (Tex. Civ. App.), 103 S. W. 197; Carpenter v. Branch, 13 Vt. 161, 37 Am. Dec. 587.

[64] Schouler Bailments (3d ed.), § 17; Hale Bailments, p. 28; Van Zile Bailments (2d ed.), §52; Morris Storage & Transfer Co. v. Wilkes, 1 Ga. App. 751, 58 S. E. 232.

§ 18. **Effect of special contract.**—If there is no special contract of bailment, the liability and duty of the parties is determined under a contract implied by law according to the character of the bailment.[65] But the parties by a special contract may determine the manner and time of the accomplishment of the bailment purpose, and may regulate the responsibilities and liabilities of the parties to any extent not forbidden by public policy or by statute.[66] So the bailee may be relieved from all liability, or may become an insurer, but any enlargement or restriction of the liability imposed by law must clearly appear from words of express and unambiguous meaning.[67] Public policy forbids a bailee to contract against the consequences of wilful misconduct[68] or gross negligence,[69] it seems, and probably no court would uphold a contract making one unaccountable for the acts of his agents and servants.[70]

§ 19. **Compound or mixed bailments.**—"Compound bailments may exist, involving the mingled undertakings of custody, carriage, or work upon a thing; or again, so that one part of the service is upon recompense and another gratuitous; and a bailee's liability may shift accordingly."[71]

§ 20. **Redelivery.**—As we have seen, the redelivery of the property bailed to the bailor, or the disposal of it as he directs, after the accomplishment of the bailment purpose, is an essential element of the bailment contract. The general rule is that the identical property delivered must be returned, together

[65] Story Bailments (9th ed.), § 10; Schouler Bailments (3d ed.), § 20; Hale Bailments, p. 28; Conway Bank v. American Express Co., 8 Allen (Mass.) 512.

[66] Schouler Bailments (3d ed.), § 20; Story Bailments (9th ed.), §§ 31-36; Jones Bailments, 48; Hale Bailments, p. 28; Patterson v. Wenatchee Canning Co., 59 Wash. 556, 110 Pac. 379.

[67] Trefftz v. Canelli, L. R. 4 P. C. 277; Belden v. Perkins, 78 Ill. 449; Story Bailments (9th ed.), § 33.

[68] Schouler Bailments (3d ed.), § 20, citing Story Bailments (9th ed.), § 32; Doct. & S. 2 c. 38; Jones Bailments, 11, 48.

[69] Lancaster County Nat. Bank v. Smith, 62 Pa. St. 47. See Archer v. Walker, 38 Ind. 472.

[70] Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473, 494.

[71] Schouler Bailments (3d ed.), § 21, citing Mariner v. Smith, 5 Heisk. (Tenn.) 203, in which gold was bailed without reward to be sold if the market rose to a certain height, otherwise only to be kept in custody, and Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. 162, in which by mutual agreement a gratuitous bailment was changed into a bailment for hire.

with all accessions to it during the term of bailment.[72] If the purpose of the bailment contemplated that the property should be changed in form, as where milk is bailed to a dairyman to be returned as cheese and butter, or grain to a miller to be made into flour, or cloth to a tailor to be made into clothes, delivery in the changed form is expected.[73] And ordinarily delivery of other property of the same kind and equal value and quantity is not a fulfilment of the obligation to redeliver the specific chattel.[74] But it is held that this rule does not apply to stocks, for there is no conceivable reason why another stock certificate of precisely similar character is not the precise equivalent of the one bailed, though in the case of ordinary bailments there may be special reasons for desiring the return of the specific chattel.[75] And it is the rule where grain is stored in a common bin with the grain of the warehouseman and others, where it is impossible to return the exact subject of the bailment, yet the relation is that of a bailment and not a sale, and the obligation to redeliver is met by returning a like quantity of grain of like quality.[76]

§ 21. **Termination of relation.**—If the contract of bailment is limited as to time, the bailment is ended at the expiration of the time, and the bailee must either redeliver the property or dispose of it as the owner directs or excuse his failure, and if he does not the owner may hold him for conversion, or as having renewed the bailment on the same terms.[77] When the bailment purpose is accomplished either party may end the bailment, the bailor by demanding the return of the goods, or the bailee by tendering them back to the bailor, in the absence of legal excuse

[72] Van Zile Bailments (2d ed.), § 60; Dale v. See, 51 N. J. L. 378, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. 688; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

[73] Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215n; Schouler Bailments (3d ed.), § 6; Van Zile Bailments (2d ed.), § 61.

[74] Van Zile Bailments (2d ed.), § 60; Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282.

[75] Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282.

[76] Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430; Sexton v. Graham, 53 Iowa 181, 4 N. W. 1090; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; Bretz v. Diehle, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. 706, and note; note 94 Am. St. 221, and cases cited.

[77] Benje v. Creagh's Admr., 21 Ala. 151; Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; New York L. E. & W. R. Co. v. New Jersey Elec. R. Co., 60 N. J. L. 338, 38 Atl. 828; Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435n.

for non-delivery.[78] As in the case of other contracts, a bailment may be terminated at any time by the mutual agreement of the parties.[79] Where the bailment is for no fixed time, or is for the sole benefit of the bailor, he may terminate it at any time.[80] But where the bailment is for the sole benefit of the bailee, the bailor may not terminate it in such a manner or at such a time as to seriously injure the bailee, with no particular benefit to himself.[81] If the bailment is for mutual benefit, the bailor may not terminate the contract except for a breach of the contract or unwarranted action inconsistent therewith on the part of the bailee.[82] The bailee has always the power to terminate the bailment and at law the bailor cannot compel the performance of the contract, nor will equity ordinarily decree the performance of personal services.[83] But usually the bailee has no right to do so, except in the case of a commodate for his own benefit, when he can terminate the contract at any time by redelivery, and a gratuitous depositary or mandatary may usually terminate the contract upon reasonable notice to the bailor, by redelivery, but he has no right to abandon the undertaking to the injury of the bailor.[84] The bailment may be terminated by operation of law, as where the status of the parties is changed, by the bailee becoming the owner of the property[85] or one of the parties on whom the performance of the bailment purpose depends becoming incompetent, as by bankruptcy, or insanity, or by the marriage of a woman under the common law.[86] So the death of either of the parties will terminate the

The negligent delivery to the wrong person of a parcel by the bailee's agents for its delivery is a conversion. Murry v. Postal Tel. &c. Co., 210 Mass. 188, 96 N. E. 316.

[78] See cases cited in note 77, and Chattahoochee Nat. Bank v. Schley, 58 Ga. 369; Morse v. Androscoggin R. Co., 39 Maine 285; Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875.

[79] Story Bailments (9th ed.), §§ 418, 418a.

[80] Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435n. See Smith v. Niles, 20 Vt. 315, 49 Am. Dec. 782.

[81] Miller v. Dayton, 94 Minn. 340, 102 N. W. 862.

[82] Story Bailments (9th ed.), § 413; Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Crump v. Mitchell, 34 Miss. 449; Sargent v. Gile, 8 N. H. 325; Wentworth v. McDuffie, 48 N. H. 402; King v. Bates, 57 N. H. 446; Dunham v. Lee, 24 Vt. 432; Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197.

[83] See Goddard Bailments, § 27; Story Bailments (9th ed.), 202, 258, 271.

[84] Goddard Bailments, § 27; Roulston v. McClelland, 2 E. D. Smith (N. Y.) 60.

[85] Van Zile Bailments (2d ed.), § 81; Goddard Bailments, § 33.

[86] Goddard Bailments, § 32; Story Bailments (9th ed.), § 206; Parker v. Smith, 16 East 382; Minett v. For-

contract unless it is of a nature that can be performed by the personal representative of the deceased.[87] So where the subject of the bailment is destroyed the contract is terminated, for there is then nothing upon which the bailment purpose can be accomplished, but the liabilities of the parties would be governed by the general rules before mentioned.[88] And in many cases the effect as to the termination of the contract by any of the happenings above mentioned depends upon the character of bailment.

§ 22. Form of action and burden of proof.—The bailor may as a rule bring an action either in contract or in tort for loss or injury to the goods in the possession of the bailee.[89] The weight of modern authority holds the rule to be that where the bailor has shown that the goods were received in good condition by the bailee and were returned by him in an injured or damaged condition, or were not returned or delivered over at all, he has made out a case of prima facie negligence or misconduct against the bailee, if ordinarily such injury or loss could not have occurred without negligence on the part of the bailee, and the bailee must show that the loss or damage was caused without his fault.[90] The effect of this rule is not to shift the burden of

rester, 4 Taunt. 541; Ex parte Newhall, 2 Story 360; Van Zile Bailments (2d ed.), § 83.

[87] Story Bailments (9th ed.), §§ 202-205, 277, 418, 419; Schouler Bailments (3d ed.), § 156; Farrow v. Bragg's Admr., 30 Ala. 261; Mecartney v. Carbine, 108 Ill. App. 282; Marvel v. Philips, 162 Mass. 388, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. 370; McKeown v. Harvey, 40 Mich. 226; Bambrick v. Webster Groves' Assn., 53 Mo. App. 225; Blount v. Hamey, 43 Mo. App. 644; Morris v. Lowe, 97 Tenn. 243, 36 S. W. 1098; Fulton v. Denison Nat. Bank, 26 Tex. Civ. App. 115, 62 S. W. 84; Hunt v. Rousmanier's Admrs., 8 Wheat. (U. S.) 174, 5 L. ed. 589.

[88] New York L. E. & W. R. Co. v. New Jersey &c. R. Co., 60 N. J. L. 338, 38 Atl. 828; Goddard Bailments, § 33.

[89] Schouler Bailments including Carriers (1905), § 12, citing 1 Chitty Pl. 151; Coal Co. v. Richter, 31 W. Va. 858, 8 S. E. 609. See Hackney v. Perry, 152 Ala. 626, 44 So. 1029; Rhodes &c. Co. v. Freeman, 2 Ga. App. 473, 58 S. E. 696; Redel v. Missouri Valley Stone Co., 126 Mo. App. 163, 103 S. W. 568.

[90] Schouler on Bailments (3d ed.), § 23; Schouler Bailments including Carriers (1905), § 12; Hale Bailments, p. 31; Pratt v. Waddington, 23 Ont. L. R. 178, 21 Ann. Cas. 840, and cases cited in note; Hackney v. Perry, 152 Ala. 626, 44 So. 1029; Haas v. Taylor, 80 Ala. 459, 2 So. 633; Boies v. Hartford & N. H. R. Co., 37 Conn. 272, 9 Am. Rep. 347; Johnson v. Perkins, 4 Ga. App. 633, 62 S. E. 152; Bates v. Capital State Bank, 18 Idaho 429, 110 Pac. 277; Cumins v. Wood, 44 Ill. 416, 92 Am. Dec. 189; Funkhouser v. Wagner, 62 Ill. 59; Lichtenhein v. Boston &c. R. Co., 11 Cush. (Mass.) 70; Yazoo &c. R. Co. v. Hughes, 94 Miss. 242, 47

proof from the plaintiff to the defendant, but simply the burden of proceeding. The plaintiff must in all instances prove that the bailee was negligent, but when he shows that the goods were injured while in the hands of the bailee, or were not delivered upon demand, he has made out a prima facie case, or created a presumption of negligence, which the defendant may overcome by offering evidence to show that he was not negligent, or by showing that the cause of the loss, injury or nondelivery was fire, theft, accident or some other excusable cause, and if he produces such evidence, the plaintiff in order to make out his case must show that the defendant was in fact negligent, and that his negligence caused the loss or contributed thereto. It has been held that the bailee has sufficiently exonerated himself from liability when he has shown that the cause of the loss was a mystery.[91]

§ 23. **Distinction between bailment and debt, sale or gift.** —In the civil law there was a contract known as the mutuum, or the loan of consumable goods, in which the recipient of the goods was to return, not the same identical property as in the case of a bailment, but other goods of the same kind.[92] Under the common law this would not be a bailment, but a sale, which is a transfer of the absolute or general property in a thing for a price.[93] The distinction between bailment and sale is clear. In bailment the title to the property does not pass to the bailee, but

So. 662, 22 L. R. A. (N. S.) 975n; Levi v. Missouri &c. R. Co., 157 Mo. App. 536, 138 S. W. 699; Wiser v. Chesley, 53 Mo. 547; Sulpho-Saline Bath Co. v. Allen, 66 Nebr. 295, 92 N. W. 354, 1 Am. & Eng. Ann. Cas. 21, and note; Collins v. Bennett, 46 N. Y. 490; Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725; Seybolt v. New York L. E. & W. R. Co., 95 N. Y. 562; Hasbrouck v. New York Central R. Co., 137 App. Div. (N. Y.) 532, 122 N. Y. S. 123; Allen v. Fulton Motor Car Co., 128 N. Y. S. 419, 71 Misc. 190; Oswego Bank v. Doyle, 91 N. Y. 32, 43 Am. Rep. 634; Safe Deposit Co. v. Pollock, 85 Pa. St. 391, 27 Am. Rep. 660; Gleason v. Beers' Estate, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757; Pregent v. Mills, 51 Wash. 187, 98 Pac. 328.

[91] Sanford v. Kimball, 106 Maine 355, 76 Atl. 890, 138 Am. St. 345.

[92] Street, Foundations of Legal Liability, vol. 2, p. 3; Schouler Bailments (3d ed.), § 6; Hale Bailments, p. 8. When an identical thing is to be restored, though in an altered form, the contract is one of bailment, but when the obligation is to restore other things of the like kind, and equal in value, it becomes a debt. Wetherell v. O'Brien, 140 Ill. 146, 33 Am. St. 221. See Baker v. Priebe, 59 Nebr. 597, 81 N. W. 609; Smith v. Clark, 21 Wend. (N. Y.) 83, 34 Am. Dec. 213n; Carpenter v. Griffin, 9 Paige (N. Y.) 310, 37 Am. Dec. 396.

[93] Benjamin Sales (7th ed.), § 1; Tiffany Sales (1908), 1.

only the possession; in a sale the title passes to the vendee at once. But in actual practice it is difficult to determine in many instances whether a transaction constitutes a bailment or a sale. As we have seen, where grain in a warehouse is commingled with the grain of others, even though redelivery of the exact grain is impossible, the transaction is held a bailment, and the title to the grain remains in the one who deposited it in the warehouse, the depositors being held owners in common of the common mass.[94] So the general rule is that where goods are delivered to be manufactured and the product returned, it is a bailment.[95] Where animals are left on shares, the same animals to be returned, it is a bailment;[96] if an equal number of like value, it is a sale.[97] There may be a bailment with the option of purchasing,[98] or a bailment for the purpose of sale,[99] and perhaps the most difficult distinction to be made is between such bailments as these and conditional sales. In a recent case it was said as to the distinction, "In bailment the identical thing delivered is to be restored, or the proceeds after sale. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. Has the sender the right to compel a return of the thing sent, or has the receiver

[94] See cases cited in note 76.

[95] A mere bailment, and not a sale which passes title, is created by a contract under which farmers deliver produce at a factory owned by one of them, to be manufactured into pickles and similar articles, the proceeds of the sales of which are to be divided in a certain ratio between the farmers and the manufacturer, especially where the intention of the parties was to create a bailment. Sattler v. Hallock, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. 686. Where one party was to furnish part of the materials, to which the second party was to add other materials, and to perform work and labor so as to manufacture shears for the first party, it was a bailment. Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534n. See Barker v. Roberts, 8 Greenl. (Maine) 101; Pierce v. Schenck, 3 Hill (N. Y.) 28; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215n; King v. Humphreys, 10 Pa. St. 217; Brown v. Hitchcock, 28 Vt. 452; note, 94 Am. St. 216, et seq. But compare Prichett v. Cook, 62 Pa. St. 193; Buffum v. Merry, 3 Mason (U. S.) 478, Fed. Cas. No. 2112; Laflin & Rand Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. ed. 973.

[96] Robinson v. Haas, 40 Cal. 474; Woodward v. Edmunds, 20 Utah 118, 57 Pac. 848; Manti City Savings Bank v. Peterson, 30 Utah 475, 86 Pac. 414, 116 Am. St. 862.

[97] Wilson v. Finney, 13 Johns. (N. Y.) 358.

[98] McCall v. Powell, 64 Ala. 254; cases cited 94 Am. St. 226n; Wiggins v. Tumlin, 96 Ga. 753, 23 S. E. 75; Dunlap v. Gleason, 16 Mich. 158, 93 Am. Dec. 231; Sargent v. Gile, 8 N. H. 325; Hamilton v. Billington, 163 Pa. St. 76, 29 Atl. 904, 43 Am. St. 780; Barnett v. Fein, 41 Pa. Super. Ct. 423.

[99] Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. 192n;

the option to pay for the thing in money?"[1] In any case the answer to the last question is perhaps the best test of whether a transaction is a sale or a bailment. A gift is distinguished from a bailment by the fact that a gift passes ownership and not possession only.[2] Where the relationship of debtor and creditor exists, then there is an absolute obligation upon the debtor to return a sum of money to the creditor, but there may be a bailment of money for custody, if the identical money received was simply to be kept and returned, and it has been held that there may be a bailment of money when it is not agreed or intended that the identical money shall be returned.[3]

Sturtevant Co. v. Dugan, 106 Md. 587, 68 Atl. 351, 14 Am. & Eng. Ann. Cas. 675; Chesterfield Mfg. Co. v. Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; Walker v. Butterick, 105 Mass. 237; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850n, 45 Am. St. 846.

[1] Sturtevant Co. v. Dugan, 106 Md. 587, 68 Atl. 351, 14 Am. & Eng. Ann. Cas. 675, citing In re Galt, 120 Fed. 64, 56 C. C. A. 470; In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611; John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422. See also, Lippincott v. Scott, 198 Pa. 283, 47 Atl. 1115, 82 Am. St. 801; Brown v. Billington, 163 Pa. St. 76, 29 Atl. 904, 43 Am. St. 780; Wheeler &c. Mfg. Co. v. Heil, 115 Pa. 487, 3 Atl. 616, 2 Am. St. 575; note, 94 Am. St. 234-258; In re A. Gaglione & Son, 200 Fed. 81.

[2] Van Zile Bailments (2d ed.), § 25.

[3] Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295. For other cases involving bailments of money, see Stevens v. Stevens, 132 Mo. App. 624, 112 S. W. 35; Patriska v. Kronk, 57 Misc. (N. Y.) 552, 109 N. Y. S. 1092.

CHAPTER II.

GRATUITOUS BAILMENTS.

§ 24. For benefit of bailor—Defined and distinguished.
25. Mandates.
26. Deposits.
27. Delivery and acceptance.
28. Use of the property and expenses.
29. Bailee's duty to perform bailment contract.
30. Care to be used by bailee in accomplishing the bailment purpose.
31. Effect of failure to obey instructions, or to give special care with notice that such is necessary.
§ 32. Bailee's rights against bailor or third parties.
33. The finder of lost property.
34. Special bank deposits.
35. Termination of relation and redelivery.
36. For benefit of bailee—Gratuitous loans—The commodate.
37. Creation of the relation.
38. Bailee's rights and obligations.
39. Bailor's rights and duties.
40. The care demanded of the bailee.
41. Redelivery.

§ 24. **For benefit of bailor—Defined and distinguished.** —The distinguishing characteristic of this class of bailments is that the bailee receives no benefit from or recompense for the accomplishment of the bailment purpose, and since this is true, is held to a less degree of care in its performance than in the other classes of bailments. These bailments include the same kinds of services that are embraced in contracts of hiring, that is, 1, keeping the property in custody, or deposit; 2, performing work upon a thing, and 3, carrying a thing from place to place, these latter kinds coming under the one classification of mandate. In both deposit and mandate there must be labor performed to a certain extent upon the subject of the bailment, but the distinction is, as stated by Judge Story, that in case of a deposit, the principal object is the keeping of the thing, and any services connected with such custody are merely accessorial; while in case of a mandate, the principal object is the performance of services, and the custody is merely accessorial.[1] If there is the slightest benefit or

[1] Story Bailments (9th ed.), § 41, et seq.

recompense to the bailee, the bailment is held one for mutual benefit, and the bailee is held to the care demanded in bailments for mutual benefit, so that it frequently becomes important to decide whether any benefit is received by him, even indirectly. So it is held that the bailment is one of mutual benefit if it was undertaken at the request of the bailee, as where upon invitation of a society in charge property was sent to a fair for exhibition.[2] And the same rule applies if there is no direct compensation for the bailment, but it is an incident of an occupation conducted for profit, application of this rule holding a clothing merchant liable for the ordinary care of articles of clothing removed by prospective customers while trying on garments in his shop,[3] and the proprietor of a bath house under a similar duty as to valuables which his patrons deposited in his keeping while bathing, and for the care of which he received no direct compensation.[4]

§ 25. **Mandates.**—The Roman mandatum was not an entirely similar relation to the mandate of the English law of bailments, for under the Roman law the mandatary might undertake to deliver an oral message gratuitously, and was in fact a gratuitous agent.[5] The mandate must be created by contract, but this contract may be verbal or in writing, or may in certain circumstances be implied.[6]

§ 26. **Deposits.**—The depositum of the Roman law was a relation including more than our deposit, which is a mere naked bailment of goods to be kept without reward and returned to the bailor on demand.[7] In the law of bailments, the term "deposit" has a restricted meaning. This is evidenced in the case of bank deposits. The ordinary bank deposit is not a bailment, but a loan,

[2] Prince v. Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Vigo Agricultural Society v. Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657.

[3] See Woodruff v. Painter, 150 Pa. St. 91, 24 Atl. 621, 16 L. R. A. 451. See cases cited under note, § 84, infra.

[4] Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 8 Am. & Eng. Ann. Cas. 89, 6 L. R. A. (N. S.) 828n, 115 Am. St. 114. See cases cited in note, § 84, infra.

[5] Goddard Bailments, § 42; Van Zile Bailments (2d ed.), § 85; Schouler Bailments (3d ed.), § 26.

[6] Story Bailments (9th ed.), § 160; Van Zile Bailments (2d ed.), § 85.

[7] Bates v. Capital State Bank, 18 Idaho 429, 110 Pac. 277.

since the same money deposited is not to be returned. Neither is it gratuitous, for the bank has the use of the money.[8] But the relation of a gratuitous bailee sometimes exists as to special deposits in a bank for custody. The relation of deposit is one of contract, but often of implied contract, and not express, as in the instance of the finder of lost property, or the public officer who is by law made the depositary of funds, or the sheriff who seizes goods, or the clerk of court to whom money is paid as a specific deposit, or a stake holder of property.[9] These latter relations are often spoken of as quasi-deposits. There are also bailments by operation of law which are called involuntary deposits, and which arise when the goods of one person have by an unavoidable accident or casualty been deposited upon another's land, as where cast upon another's land by a freshet, or blown there by a tempest or tornado; and the owner of land is under a duty as to such goods similar to that of the finder of lost property.[10]

§ 27. **Delivery and acceptance.**—Delivery in this class of bailments is physical, since the bailee must have actual possession in order to be charged as bailee, but it may be constructive, as where the goods were already in the possession of the bailee for some other purpose.[11] Acceptance must be voluntary, for no man can be compelled involuntarily to become a gratuitous bailee, and the finder of lost property is not chargeable except he voluntarily take charge of such property, for he may leave it where he found it, and not become a bailee.[12] Perhaps an excep-

[8] Story Bailments (9th ed.), §§ 84, 88; Wright v. Paine, 62 Ala. 340; Howard v. Roeben, 33 Cal. 399; Brahm v. Adkins, 77 Ill. 263; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Rankin v. Craft, 1 Heisk. (Tenn.) 711; Miller J., in Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252, 17 L. ed. 785.

[9] Schouler Bailments (3d ed.), § 28; Story Bailments (9th ed.), § 124; Harrington v. King, 121 Mass. 269; State v. Fitzpatrick, 64 Mo. 185; Cross v. Brown, 41 N. H. 283; Burke v. Trevitt, 1 Mason (U. S.) 96, Fed. Cas. No 2163; Thayer v. Hutchinson, 13 Vt. 504, 37 Am. Dec. 607; Bouv. Dict., "Sequestration," "Stakeholders"; Story Bailments (9th ed.), §§ 45, 103, 124; In re Western Marine & Fire Ins. Co., 38 Ill. 289; Mott v. Pettit, 1 N. J. L. 298.

[10] Story Bailments (9th ed.), § 83a; Goddard Bailments, § 47; Hale Bailments, p. 44; Anthony v. Haney, 8 Bing. 186; Mitten v. Fandrye, Poph. 161, Latch 13; Nicholson v. Chapman, 2 H. Bl. 254; Walker v. Norfolk &c. R. Co., 67 W. Va. 273, 67 S. E. 722.

[11] Schouler Bailments (3d ed.), § 32; Story Bailments (9th ed.), §§ 51, 141; Coggs v. Bernard, 2 Ld. Raym. 909.

[12] Drake v. Shorter, 4 Esp. 165; Kohler v. Hayes, 41 Cal. 455; Bobo

tion must be made in the case of "involuntary depositaries" who become bailees through the force of natural circumstances over which they have no control.

§ 28. **Use of the property and expenses.**—The depositary has generally no right to use the property deposited, except so far as the use of the thing is necessary to its preservation, or incidental to the proper performance of his duties; thus a cow must be milked, and a horse given exercise.[13] If the bailee were to gain advantage from the use, the bailment would cease to be gratuitous. The depositary who uses the property more than is contemplated by the contract of bailment is liable in breach of contract, or in some instances for conversion.[14] Bailees for the sole benefit of the bailor are entitled to recover from the bailor all expenses necessarily incurred in preserving a deposit, or in carrying out a mandate.[15] If the bailee has contracted with a third party for any necessary services, such contract is binding upon the bailor.[16] If the expenses were reasonably incurred, the bailor is liable, even if they were more than he would have paid, unless they were caused by the bailee's fault.[17]

§ 29. **Bailee's duty to perform bailment contract.**—The rule is settled that after one has undertaken the performance of a gratuitous bailment, he is under a legal liability for its proper performance under the circumstances, and thus may be held by the bailor for his misfeasance; but if he has merely agreed to undertake the performance, he is not liable for a failure to enter

v. Patton, 6 Heisk. (Tenn.) 172, 19 Am. Rep. 593; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. 99. The gratuitous bailee must assent to the bailment expressly or impliedly before the relationship of bailor and bailee is established. Blosser Co. v. Doonan, 8 Ga. App. 285, 68 S. E. 1074.

[13] Jones Bailments, 80, 81; Story Bailments (9th ed.), § 90; Schouler Bailments (3d ed.), § 52; Mores v. Conham, Owen 123; Anon., 2 Salk. 521.

[14] Clark v. Whitaker, 19 Conn. 319, 48 Am. Dec. 160; Schermer v. Neurath, 54 Md. 491, 39 Am. St. 397; King v. Bates, 57 N. H. 446; Keiner v. Folsom, 79 N. Y S. 1099; Dale v. Brinckerhoff, 7 Daly (N. Y.) 45; Cicalla v. Rossi, 10 Heisk. (Tenn.) 67.

[15] Story Bailments (9th ed.), §§ 121, 154; Schouler Bailments (3d ed.), § 63; Devalcourt v. Dillon, 12 La. Ann. 672; Harter v. Blanchard, 64 Barb. (N. Y.) 617.

[16] Story Bailments (9th ed.), § 198; Harter v. Blanchard, 64 Barb. (N. Y.) 617.

[17] Story Bailments (9th ed.), § 197.

upon it.[18] The reason for this is that the consideration which supports a gratuitous bailment is the delivery of possession of the subject of the bailment, and that there is no consideration for a mere promise to undertake a bailment; and thus there is no liability until the actual delivery of the property to the bailee.

§ 30. **Care to be used by bailee in accomplishing the bailment purpose.**—As was said in a preceding section, the bailee who undertakes a deposit or mandate for the bailor's sole benefit, he himself receiving no benefit, is held by the general rule to slight diligence in the performance of the bailment purpose.[19] The test of this must depend upon circumstances, and sometimes upon custom.[20] If it is shown that the gratuitous bailee used the same care that he used with his own goods, this furnishes a presumption that he was not negligent,[21] yet he might have been so careless with his own goods that he used less than slight diligence as to their care. Some of the cases hold such a bailee to the degree of care used by men of common prudence for the protection of their own property in similar conditions, yet this rule seems to recognize no distinction between the care demanded of gratuitous bailees, and that demanded of bailees upon recompense.[22] It would seem that perhaps the best test is the amount of care which gratuitous bailees are accustomed to take of similar goods under similar circumstances.[23] If skill is

[18] Elsee v. Gatward, 5 T. R. 143; Taylor v. Plummer, 3 M. & S. 562; Morrison v. Orr, 3 Stew. & P. (Ala.) 49; Thorne v. Deas, 4 Johns. (N. Y.) 84; French v. Reed, 6 Bin. (Pa.) 308, 23 Am. Dec. 319; Tancil v. Seaton, 28 Grat. (Va.) 601, 26 Am. Rep. 380.

[19] See § 16, supra, and cases cited. Chicago Hotel Co. v. Baumann, 131 Ill. App. 324; Stevens v. Stevens, 132 Mo. App. 624, 112 S. W. 35; Patriska v. Kronk, 57 Misc. (N. Y.) 552, 109 N. Y. S. 1092.

[20] Schouler Bailments (3d ed.), § 37; Batson v. Donovan, 4 B. & Ald. 21; Ross v. Daugherty, 127 Ill. App. 572; Eddy v. Livingston, 35 Mo. 487, 88 Am. Dec. 122; Griffith v. Zipperwick Lodge, 28 Ohio St. 388; Tompkins v. Saltmarsh, 14 Serg. & R. (Pa.) 275.

[21] Story Bailments (9th ed.), § 64; Schouler Bailments (3d ed.), § 36; Doorman v. Jenkins, 2 Ad. & E. 256; Coggs v. Bernard, 2 Ld. Raym. 909; Kettle v. Broomsall, Willes 118; Shiells v. Blackburne, 1 H. Bl. 159; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Bland v. Womack, 2 Murph. (N. Car.) 373; Tracy v. Wood, 3 Mas. (U. S.) 132.

[22] Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. 172; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. 162.

[23] Finucane v. Small, 1 Esp. 315; Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769n, 39 Am. St. 172; Bean v. Ford, 65 Misc. (N. Y.)

required in the carrying out of the bailment purpose, nothing more can be demanded of the bailee than the skill of the average person of the same profession or occupation who undertakes such things, and it seems that less skill than this would still be slight skill, and all the bailor was entitled to demand, but the failure to use any skill would be gross negligence.[24] Though some courts have attempted to get away from the rule of slight diligence and fix the degree of care by the mutual understanding of the parties,[25] yet the rule supported by the weight of authority is that "the bailee's liability in bailments under the present head must be, apart from special contract modifications, such a degree of diligence, less than what the average of mankind under the same conditions and circumstances are wont to exert with reference to similar property, as may be relatively termed slight diligence; that, correspondingly, he is liable only for what the law terms great or gross negligence; and that, of course, for dishonesty and bad faith in performing the transaction, he becomes, as a matter of course, liable. But it is here essential that the bailment be undertaken gratuitously and without the expectation of reward."[26]

481, 119 N. Y. S. 1074; Bland v. Womack, 2 Murph. (N. Car.) 373; Anderson v. Foresman, Wright (Ohio) 508; Tracy v. Wood, 3 Mason 132.

[24] Shiells v. Blackburne, 1 H. Bl. 159; Conner v. Winton, 8 Ind. 315, 65 Am. Dec. 761; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Eddy v. Livingston, 35 Mo. 487, 88 Am. Dec. 122; Stanton v. Bell, 2 Hawks (N. Car.) 145; First Nat. Bank v. Graham, 79 Pa. St. 106, 21 Am. Rep. 49.

[25] Mariner v. Smith, 5 Heisk. (Tenn.) 203.

[26] Schouler Bailments Including Carriers (1905), § 35. For cases holding to this rule, see Coggs v. Bernard, 2 Ld. Raym. 909; Gray v. Merriam, 46 Ill. App. 337, affd., 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. 172; Hibernia Building Assn. v. McGrath, 154 Pa. St. 296, 35 Am. St. 828. See cases cited in preceding notes. It was said in a recent case that courts are indisposed to extend, by inference, the perils of an unprofitable trust; and so every bailee without reward is regarded as having assumed the least responsibility consistent with his actual undertaking. Christian v. First Nat. Bank, 155 Fed. 705, 84 C. C. A. 53. Among cases which exemplify the rule that the gratuitous bailee for the benefit of the bailor is liable for gross negligence, are the following: In the leading case of Coggs v. Bernard, 2 Ld. Raym. 909, one who gratuitously undertook to carry casks of brandy from one cellar to another did the work so carelessly that he broke one of the casks, spilling its contents, and was held liable for the loss. So a gratuitous bailee who turned a horse after dark into a dangerous pasture to which it was unaccustomed was liable for injuries caused thereby. Rooth v. Wilson, 1 B. & Ald. 59. A person gratuitously undertook to carry two bags of gold from New York to Boston and brought the gold in a valise together

§ 31. Effect of failure to obey instructions, or to give special care with notice that such is necessary.—The bailee is held to a degree of diligence in obeying the instructions of the bailor, and for loss caused by failure to comply therewith, under circumstances amounting to gross negligence, he is liable.[27] He may by special contract increase his liability, and the law will enforce it if he is foolish enough to do so.[28] If the bailee has notice of facts requiring special care, the degree of diligence which he must use is affected by his knowledge of such facts, as where a clerk receipted for a registered letter for a guest of a hotel, he was held to have notice that the letter was of more than ordinary importance from the signing of the receipt, and having put the letter in the hotel letter box, from which it was stolen, he was

with gold money of his own on board the vessel the night before it was to sail and left it in another cabin which he occupied. In the morning he found one bag of gold missing, left the valise on his cabin table and went to inform the ship's authorities. When he returned he found the other bag missing. He had been told that if his valise was valuable, he had better give it to the clerk. Though he used the same care for the goods gratuitously carried that he did for his own the court held that it was a question for the jury whether he had not been guilty of gross negligence. Tracy v. Wood, 3 Mas. (U. S.) 132. Sending loose money through the mails unauthorizedly may be gross negligence. Jenkins v. Bacon, 111 Mass. 373, 15 Am. Rep. 33. One who has allowed a prior tenant's stove to remain in his office for some time and then without notice to the owner puts it out in a vacant lot, exposing it to injury, has been guilty of gross negligence. Burk v. Dempster, 34 Nebr. 426, 51 N. W. 976. But where an applicant for a license to practice medicine sent his diploma to the board of health with a request for the issue of a license, and the board received the diploma, and passed upon it, and according to their custom, placed it in a mailing case, properly directed to the applicant, and delivered it to the Adams Express Company which had an office at the place of sending, and at the place of delivery to the applicant, and further, the applicant had given no instructions as to how the diploma was to be returned, and had not furnished funds to pay for its return, and the applicant received the mailing case, but the diploma had been lost from it, it was held that the selection of the carrier and delivery of the diploma to it for return were not actionable negligence on the part of the secretaries of the board rendering them personally liable for the loss of the diploma. Whiteside v. Adams Express Co., 89 Nebr. 430, 131 N. W. 953.

[27] Stewart v. Frazier, 5 Ala. 114; Ferguson v. Porter, 3 Fla. 27; Fellowes v. Gordon, 8 B. Mon. (Ky.) 415; McCauley v. Davidson, 10 Minn. 418; Cannon R. Mfg. Co. v. First Nat. Bank, 37 Minn. 394, 34 N. W. 741; Colyar v. Taylor, 1 Cold. (Tenn.) 372. A gratuitous bailee is bound to obey bailor's instructions to procure insurance on stored property. Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459. The rule that a gratuitous bailee is not liable for mere misfeasance does not apply when the subject of the bailment has been actually delivered and accepted by him. Herzig v. Herzig, 67 Misc. (N. Y.) 250, 122 N. Y. S. 440.

[28] Schouler Bailments (3d ed.), § 51; Clark v. Gaylord, 24 Conn. 484.

liable for the loss of the money contained in it.[29] But if the bailor has notice of the general character and habits of the bailee, and the character of his facilities for performing the bailment purpose, he is held to have contracted with this in mind, and if the goods have been lost under circumstances so that it can be said that he contracted for them to be kept in such manner, the bailor must bear the loss, for he did not need to trust them to such a bailee.[30] In fixing the duty of a bailee who receives articles in a sealed package, it is important to ascertain whether he knew or should have known the character of the contents, for what might be high diligence in the care of a box of old papers might be gross negligence in the care of a casket of jewels.[31] And if he did not know their character, in the absence of fraud or concealment on the part of the bailor, he is liable for their true value if lost through his gross negligence.[32]

§ 32. Bailee's rights against bailor or third parties.—It is said that the bailor cannot be liable in contract to the bailee for damage sustained in executing the bailment contract, since if danger was not foreseen, the bailor cannot be said to have contracted to indemnify the bailee; and if the danger was foreseen, the bailee is held to have assumed it.[33] So the bailor is not liable in tort unless in making the bailment he knew of danger likely to occur, and was negligent in failing to warn the bailee.[34] The gratuitous bailee has a right of possession sufficient to allow him to bring an action against a third party for damage caused to the property bailed, or for trespass or conversion.[35]

[29] Joslyn v. King, 27 Nebr. 38, 42 N. W. 756, 4 L. R. A. 457, 20 Am. St. 656.

[30] Knowles v. Railroad Co., 38 Maine 55, 61 Am. Dec. 234; Conway Bank v. American Exp. Co., 8 Allen (Mass.) 512; Arthur v. Railway Co., 38 Minn. 95, 35 N. W. 718.

[31] Story Bailments (9th ed.), § 77; Hale Bailments, p. 69.

[32] France v. Gaudet, L. R. 6 Q. B. 199; Wilson v. Railway Co., 9 C. B. (N. S.) 631; Little v. Boston & M. R. R. Co., 66 Maine 239; Mather v. American Express Co., 138 Mass. 55, 52 Am. Rep. 258.

[33] Hale Bailments, p. 54, citing Paley, Moral Phil. bk. 3, ch. 12.

[34] Jaggard Torts, 87; Day v. Brownrigg, 10 Ch. Div. 294; Backhouse v. Bonomi, 9 H. L. Cas. 503; Gagnon v. Dana, 69 N. H. 264, 39 Atl. 982, 41 L. R. A. 389, 76 Am. St. 170; Rich v. New York Cent. & H. R. R. Co., 87 N. Y. 382.

[35] Schouler Bailmments (3d ed.), § 54; 2 Kent Com. 568, 585; 2 Bl. Com. 395, 452; Story Bailments (9th ed.), §§ 94, 133; Armory v. Delamirie, 1 Strange 505; Harrington v. King, 121 Mass. 269; Brown v. Shaw, 51 Minn. 266, 53 N. W. 633; Cham-

§ 33. The finder of lost property.—The finder of lost property who takes the same in his possession becomes the gratuitous depositary for the owner thereof. His right to the property is absolute as against all the rest of the world,[36] and it has often been held that where the property was found in the chattels of an employer, or on his premises, the finder's rights were superior to those of the employer.[37] It seems that for the mere act of finding he is entitled to no recompense, but for expenditures incident to finding it and possessing himself of it, and expended in good faith for its care and protection, he is entitled to compensation from the owner, it being held that he takes the property under an implied request from the owner to all persons to take the property and care for it for him, and to recompense them for necessary expenditures in so doing.[38] The finder is not entitled to a lien upon the property to secure his expenditures, unless it is provided for by statute, as in some cases where animals astray or logs adrift are taken in, or unless the owner has offered a reward for the return.[39] The liabilities and duties of the finder of lost property are in general those of any other gratuitous depositary.

§ 34. Special bank deposits.—Where money, gold, stocks, bonds or valuable papers are deposited with a bank upon the understanding that the identical thing shall be returned, it is a bailment, and if no recompense is charged, a gratuitous bailment, and the bank is held to the general rules regarding gratu-

berlain v. West, 37 Minn. 54, 33 N. W. 114; New York & Harlem R. Co. v. Haws, 56 N. Y. 175; Abrahamovitz v. New York City R. Co., 104 N. Y. S. 663; Galveston H. & S. A. R. Co. v. Zantzinger, 93 Tex. 64, 53 S. W. 379, 47 L. R. A. 282, 77 Am. St. 829; Thayer v. Hutchinson, 13 Vt. 504.

[36] Lawrence v. Buck, 62 Maine 275; Hoagland v. Forest Park &c. Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. 740; Tancil v. Seaton, 28 Grat. (Va.) 601, 26 Am. Rep. 380.

[37] Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528 (Where the depositary of an old safe to sell found a roll of bills concealed therein, the finder could keep the bills as against the owner of the safe.); Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172 (where an employé found money in old rags which she was sorting to make paper); Hamaker v. Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664 (where a domestic servant found bills in a hotel parlor).

[38] Reeder v. Anderson's Admrs., 4 Dana (Ky.) 193; Chase v. Corcoran, 106 Mass. 286.

[39] Preston v. Neale, 12 Gray (Mass.) 222; Wentworth v. Day, 3 Metc. (Mass.) 352; Wood v. Pierson, 45 Mich. 313, 7 N. W. 888; 4 Cummings v. Gann, 52 Pa. St. 484.

itous bailments for the benefit of the bailor.[40] In the leading case it was held that the bank was not liable for the theft by its cashier of bags of gold on special deposit, because the fraud or felony of its agents was beyond the scope of their employment, and the bank was not liable, except for their negligence.[41] But it is said that the bank would be liable, if the directors had knowledge of acts upon the part of its cashier which should put them on their guard against his misconduct toward depositors.[42] Nor can a cashier of a bank bind the bank by receiving such deposits unless he has authority, express or implied, but such authority may be implied from custom known to the directors.[43] If the property is lost by burglars taking it from the vault, the bank is not liable.[44] Where, without consideration, a bank receives from a money lender a sum to be delivered to one of his customers, on a check to be drawn by the customer, and the bank pays the money on a check received at the time and under the circumstances as agreed, and in the due course of business, the bank is merely a gratuitous bailee for the benefit of the bailor, and is not liable for the amount of the money because such check was a forgery, if good faith and ordinary diligence were used by it.[45]

§ 35. Termination of relation and redelivery.—The general rules of bailments relating to the termination of the relation

[40] Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Smith v. First Nat. Bank, 99 Mass. 605; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Scott v. Bank of Chester Valley, 72 Pa. St. 471. Special deposits, whether of money, bonds, stocks, or other securities, are imposed with such conditions, usual or unusual, as are dictated by the depositor and accepted by the depositary. Van Waggoner v. Buckley, 133 N. Y. S. 599. A bank is liable for loss of diamonds received on special deposit through gross negligence of employes. First Nat. Bank v. Tevis, 29 Okla. 714, 119 Pac. 218.

[41] Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168. See cases cited above, and Chattahoochee Nat. Bank v. Schley, 58 Ga. 369; First Nat. Bank v. Graham, 79 Pa. St. 106, 21 Am. Rep. 49.

[42] Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. 172; L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. 354; First Nat. Bank v. Rex, 89 Pa. St. 308, 33 Am. Rep. 767; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. 162.

[43] Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

[44] Gerrish v. Muskegon Sav. Bank, 138 Mich. 46, 100 N. W. 1000, 4 Ann. Cas. 1083 and note. See also, Louisville &c. R. Co. v. Buffington, 131 Ala. 620, 31 So. 592; Carlyon v. Fitzhenry, 2 Ariz. 266, 15 Pac. 273.

[45] Armour v. Greene County State Bank, 112 Fed. 631, 50 C. C. A. 399; Cannon River Mfgrs.' Assn. v. First Nat. Bank, 37 Minn. 394, 34 N. W. 741; People's Nat. Bank of Kingfisher v. Wheeler, 21 Okla. 387, 96 Pac. 619, 21 L. R. A. (N. S.) 816n.

and redelivery apply equally to bailments of the class just considered. As to the redelivery, or delivery over, the terms of the bailment are ordinarily controlling.[46] A stakeholder usually must exercise some discretion or responsibility to ascertain to whom delivery should be made.[47] The bailor may, of course, terminate the bailment at will, and a depositary without hire may terminate the bailment at pleasure, upon giving reasonable notice to the owner, unless he has contracted to keep the goods for a fixed time.[48] A gratuitous bailee must redeliver to the proper person, at peril of being held for a conversion.[49]

§ 36. For benefit of the bailee—Gratuitous loans—The commodate.—Where property is loaned gratuitously by the owner for the sole benefit, accommodation and use of the borrower, and the specific thing loaned is to be returned, a gratuitous bailment relation is created, which may be called a commodate, from the Roman commodatum, a similar relation.[50] Our English loan includes also the loan of money for reward, and the loan of goods to be returned in kind, neither of which is a bailment. The distinction between the commodate and other bailments lies in the fact that there is no benefit of any kind, directly or indirectly, to the bailor, but the benefit is solely to the bailee, for if there were mutual benefit, however slight, the bailment would become one of a different class, in which the liabilities are very different. Since the general rule in bailments is that the liability of the bailee is proportionate to the benefit he receives, it follows that the bailee in commodate is held to a very high degree of care for the thing loaned, and this feature distinguishes his legal liability from that of other bailees.

[46] Story Bailments (9th ed.), §§ 117, 118; Roulston v. McClelland, 2 E. D. Smith (N. Y.) 60; Bliven v. Hudson R. Co., 36 N. Y. 403; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

[47] Trefftz v. Canelli, L. R. 4 P. C. 277; Carle v. Bearce, 33 Maine 337; State v. Fitzpatrick, 64 Mo. 185.

[48] Hale Bailments, pp. 74, 75; Winkley v. Foye, 33 N. H. 171, 66 Am. Dec. 715; Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; Roulston v. McClelland, 2 E. D. Smith (N. Y.) 60; Goodwin v. Ray, 108 Tenn. 614, 69 S. W. 730, 91 Am. St. 761.

[49] Wear v. Gleason, 52 Ark. 364, 12 S. W. 756, 20 Am. St. 186.

[50] See Schouler Bailments (3d ed.), § 66; Street, Found. Leg. Liab., vol. 2, ch. 28, p. 281.

§ 37. **Creation of the relation.**—This relation can only arise by contract, for only by the owner's consent can one acquire the right to use another's property for his own benefit.[51] Therefore the parties must be competent, and fraud or duress will vitiate the contract, as in the case of any other contract.[52] Nor can an executory contract for a loan be enforced, since the consideration for the bailment does not arise until the delivery of the property loaned.[53] If the contract is not for a legal purpose the law will not recognize it.[54] The relationship begins with the delivery of the article loaned to the borrower, and there is no liability upon either party before.[55]

§ 38. **Bailee's rights and obligations.**—The bailee of this class, has, like all other bailees, a possessory right which he can legally defend against third parties.[56] His right to use the article loaned depends entirely upon the conditions of his contract, and any deviation in the slightest degree therefrom is a tort, and renders him strictly liable for any resulting injury, even though it was caused by the act of God, or the public enemy, or irresistible force, and though this rule can be said to apply to every bailee, it is construed much more strictly in the case of the bailee in a commodate relation.[57] So the bailee, having the use of the article, must pay all ordinary expenses connected with its use, as

[51] Hagebush v. Ragland, 78 Ill. 40; State v. Bryant, 74 N. Car. 124.

[52] Hagebush v. Ragland, 78 Ill. 40; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Vasse v. Smith, 6 Cranch (U. S.) 226, 3 L. ed. 207.

[53] Elsee v. Gatward, 5 T. R. 143; Shillibeer v. Glyn, 2 M. & W. 143; Thorne v. Deas, 4 Johns. (N. Y.) 84; Crosby v. German, 4 Wis. 373.

[54] Story Bailments, § 229; Van Zile Bailments (2d ed.), § 103.

[55] Schouler Bailments (3d ed.), § 71.

[56] Chamberlain v. West, 37 Minn. 54, 3 N. W. 114; Paddock v. Wing, 16 How. Pr. (N. Y.) 547; Hurd v. West, 7 Cow. N. Y.) 752; Hendricks v. Decker, 35 Barb. (N. Y.) 298; Barker v. Miller, 6 Johns. (N. Y.) 195; cases cited Hale Bailments, p. 90.

[57] Van Zile Bailments (2d ed.), § 105; Coggs v. Bernard, 2 Ld. Raym. 909; Bringloe v. Morrice, 1 Mod. 210; Bryant v. Wardell, 2 Exch. 479; Stewart v. Davis, 31 Ark. 518, 25 Am. Rep. 576; Ross v. Southern Cotton Oil Co., 41 Fed. 152; Wilcox v. Hogan, 5 Ind. 546; Cullen v. Lord, 39 Iowa 302; Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Wheelock v. Wheelwright, 5 Mass. 104; Beller v. Schultz, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280; Scranton v. Baxter, 4 Sandf. (N. Y.) 5; Collins v. Bennett, 46 N. Y. 490; Fox v. Pruden, 3 Daly (N. Y.) 187; Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500.

for feed, care and shoes for a horse.[58] But he is not liable for extraordinary expenses not incident to the use and not caused by his fault, as, for instance, if a horse should be taken so sick that a veterinary was necessarily employed, the bailor would be liable for expenses so incurred, and the bailee could recover from the bailor if he had paid them.[59] One to whom photographs are loaned for a particular purpose has no right, in the absence of express or implied authority, to use them for any other,[60] and where a photograph was loaned to a painter to aid him in painting a portrait, and he painted a second portrait from it, it was a violation of the contract, and a breach of the trust reposed in the painter under the contract relation existing with the owner.[61] A vendor of chattels who undertakes to ship them to a consignee is liable for their value in case they are lost through his failure to see that they reach the carrier.[62]

§ 39. Bailor's rights and duties.—The bailor must generally warn the bailee of any known defects in the thing lent, but is not liable for injuries caused by defects of which he did not know.[63] He must reimburse the bailee for extraordinary expenses incurred in the preservation of the chattel, not caused by the bailee's fault.[64] And it seems that if the bailment is for a fixed term he must allow the bailee to use the thing loaned until the expiration of that term, at least if termination of the loan before that time would injure the bailee,[65] though some authorities regard

[58] Bennett v. O'Brien, 37 Ill. 250; Harrington v. Snyder, 3 Barb. (N. Y.) 380.

[59] Chase v. Corcoran, 106 Mass. 286; Starrett v. Barber, 20 Maine 457; Dale v. Brinkerhoff, 7 Daly (N. Y.) 45; Harter v. Blanchard, 64 Barb. (N. Y.) 617; Blake v. Buchanan, 22 Vt. 548.

[60] Tuck v. Priester, 19 Q. B. Div. 629; Corliss v. E. W. Walker Co., 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283; Klug v. Sheriffs, 129 Wis. 468, 109 N. W. 656, 9 Am. & Eng. Ann. Cas. 1013, and note.

[61] Klug v. Sheriffs, 129 Wis. 468, 109 N. W. 656, 9 Am. & Eng. Ann. Cas. 1013.

[62] Sprinkle v. Brim, 144 N. Car. 401, 57 S. E. 148, 12 L. R. A. (N. S.) 679 and note. See Coggs v. Bernard, 2 Ld. Raym. 909, 1 Smith Lead. Cas. (9th Am. ed.) 354 and notes; Clark v. Hutchins, 14 East. 475; Dickey v. Grant, 6 Cow. (N. Y.) 310; Diebold Safe & Lock Co. v. Holt, 4 Okla. 479, 46 Pac. 512; McCandlish v. Newman, 22 Pa. St. 460.

[63] Blakemore v. Bristol &c. R. Co., 8 El. & Bl. 1035; Coughlin v. Gillison (1899), 1 Q. B. 145; MacCarthy v. Young, 6 H. & N. 329; Gagnon v. Dana, 69 N. H. 264, 39 Atl. 982, 41 L. R. A. 389, 76 Am. St. 170.

[64] See cases cited under note 59.

[65] Hale Bailments, p. 97, citing Bringloe v. Morrice, 1 Mod. 210; Root v. Chandler, 10 Wend. (N. Y.) 110; Hoyt v. Gelston, 13 Johns. (N. Y.) 141, affd., 13 Johns. (N. Y.)

such a bailment as entirely precarious, and terminable at any time by the bailor;[66] and in any event in the absence of stipulation, the bailor may terminate the bailment after a reasonable period of time.[67] He may sue third parties in his own name for injuries, while the article is in the possession of the bailee.[68]

§ 40. The care demanded of the bailee.—The bailee is held to the strictest care of the property and is answerable for damages resulting from the slightest neglect,[69] and is held with the same strictness to follow the directions of the owner and the conditions of the loan.[70] It has sometimes been said that he is bound to use more care than he used for his own goods, but this is not a fair test, the real test being whether he was guilty of any negligence.[71] Since he is liable for only slight negligence, it would seem that he is held to use the degree of care which men of more than ordinary prudence use in the care of their own goods in similar circumstances.[72] On the other hand, if the lender knows from the borrower's character, habits or skill, that he is not capable of bestowing the care of a more than ordinarily prudent man, he has loaned the article with this in mind, and cannot hold the borrower to greater care than he is capable of, as where a horse is lent to an inexperienced boy, the lender cannot expect him to exercise the care of a skilled horseman.[73] If the borrower has not departed from his contract, or has not been negligent, he is not liable for acts caused by the act of God, the

561; Schouler Bailments (3d ed.), § 87; Story Bailments (9th ed.), §§ 258, 261.

[66] See Schouler Bailments (3d ed.), § 81; Story Bailments (9th ed.), § 277.

[67] Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Clapp v. Nelson, 12 Tex. 370, 62 Am. Dec. 530.

[68] Claridge v. South Staffordshire Tramway Co. (1892), 1 Q. B. 422; Orser v. Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543. See cases cited above.

[69] Street, Found. Leg. Liab., vol. 2, ch. 28, p. 281; Schouler Bailments (3d ed.), § 72; Story Bailments (9th ed.), § 237; Van Zile Bailments, § 102; Acyzynski v. Bulkiewicz, 140 Ill. App. 375.

[70] See cases cited under note 57, § 38.

[71] Schouler Bailments (3d ed.), § 75; Story Bailments (9th ed.), §§ 245-251; Hale Bailments, pp. 94-95.

[72] Story Bailments (9th ed.), § 238; Schouler Bailments (3d ed.), § 72; Vaughan v. Menlove, 3 Bing. N. C. 468; Beller v. Schultz, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280.

[73] Beale v. South Devon R. Co., 12 W. R. 1115; Wilson v. Brett, 11 M. & W. 113; Knowles v. Atlantic & St. L. R. Co., 38 Maine 55, 61 Am. Dec. 234; Mooers v. Larry, 15 Gray (Mass.) 451; Eastman v. Patterson, 38 Vt. 146.

public enemy, irresistible force, or inevitable accident, nor for the acts of a robber, thief or mere stranger.[74] He must at all times exercise perfect good faith, a duty devolving upon all bailees. For damage caused by ordinary wear or tear he is not liable.[75]

§ 41. **Redelivery.**—The bailee must return the thing borrowed, and everything accessorial, as the young of an animal, born during the time of the bailment, and the income of stock loaned to allow the borrower to pledge it as security.[76] He must return it at the time specified, or he is liable in an action for breach of contract,[77] or, if no time was fixed, within a reasonable time.[78] The contract will ordinarily govern as to the place of delivery; if not, the proper place is to be determined from the circumstances.[79] In general, delivery must be made to the lender, but if the bailee restores it to the true owner, or the true owner takes it from his possession, this relieves him from liability to the lender.[80] The borrower cannot retain the article borrowed as security for any antecedent debt owing to him. That would be a departure from the contract obligations, and, indeed, an exercise of bad faith on the part of the bailee.[81]

[74] Abraham v. Nunn, 42 Ala. 51; Bennett v. O'Brien, 37 Ill. 250; Wood v. McClure, 7 Ind. 155; Watkins v. Roberts, 28 Ind. 167; Yale v. Oliver, 21 La. Ann. 454; Beller v. Schultz, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280; Scranton v. Baxter, 4 Sandf. (N. Y.) 5; Fortune v. Harris, 6 Jones (N. Car.) 532.

[75] Hyland v. Paul, 33 Barb. (N. Y.) 241. See cases cited in note 74.

[76] Booth v. Terrell, 16 Ga. 20; Allen v. Delano, 55 Maine 113, 92 Am. Dec. 573; Orser v. Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543; Hasbrouck v. Vandervoort, 4 Sandf. (N. Y.) 74.

[77] Fox v. Pruden, 3 Daly (N. Y.), 187; Clapp v. Nelson, 12 Tex. 370, 62 Am. Dec. 530.

[78] Lay's Exr. v. Lawson's Admr., 23 Ala. 377; Wilcox v. Hogan, 5 Ind. 546; Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680; Ross v. Clark, 27 Mo. 549.

[79] Hale Bailments, § 23, p. 99.

[80] Hale Bailments, § 23, p. 100; Shelbury v. Scotsford, Yel. 23; Watkins v. Roberts, 28 Ind. 167; Whittier v. Smith, 11 Mass. 211; The "Idaho," 93 U. S. 575, 23 L. ed. 978.

[81] Story Bailments (9th ed.), § 262; Fick v. Runnels, 48 Mich. 302, 12 N. W. 204; Enos v. Cole, 53 Wis. 235, 10 N. W. 377.

CHAPTER III.

PLEDGES.

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§ 42. What is a pledge.—With the subject of pledges we pass to bailments of mutual benefit. A pledge is a bailment of a chattel to secure the payment of a debt, or the performance of an obligation, with power of sale in case of a default.[1] This relationship probably had its origin in the business of the pawnbroker, who made loans upon jewelry and wearing apparel as security, but in the modern business world the relationship has

[1] See Jones Pledges, 1; Hale Bailments, § 25; Goddard Bailments, § 70; First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408.

expanded, and now the pledgee is perhaps more often a banking corporation which makes loans on collateral security, a loan and security corporation, or a collateral security bank, carrying on transactions amounting to millions of dollars, so that the law of pledges is one of the most important branches of the modern law of contracts, and, excepting carriers, the subject is the most extensive in its application of the bailment subjects. The relation is essentially a contract relation; therefore the ordinary rules of contracts as to the competency of parties, the consideration, mutual assent, and construction of contracts apply, while the principles of agency as well are applicable.

§ 43. **Pledge distinguished from chattel mortgage and lien.**—The holder of a lien on personal goods has the right to retain the goods until the debt is paid, but has no right to sell them, and as a rule cannot transfer his lien, it being personal.[2] The holder of goods in pledge has not only the right to retain them until the obligation is met, but may sell them in case of default, and ordinarily may transfer his right.[3] The holder of a chattel mortgage holds the legal title to the goods, subject to defeat by the payment of the debt or obligation, and thus has a greater right than the pledgee, while the lienholder has a lesser right. And as the mortgagee holds by transfer of title, it is not essential to the maintenance of his rights that he should have possession of the goods, while the pledgee's rights depend upon possession.[4] Apparently absolute transfers of property may be shown to have been intended by the parties as merely pledges for security, and in construing such contracts the courts are governed largely by the intention of the parties, so that "whether one is a purchaser or pledgee depends upon the true intent of the transaction."[5]

[2] Hale Bailments, p. 103; Schouler Bailments, Including Carriers (1905), § 139; Goddard Bailments, § 72; McCombie v. Davies, 7 East 5; Pothonier v. Dawson, Holt N. P. 383. See note 94 Am. St. 240.

[3] See infra, §§ 57, 68-72; 1 Powell Mortgages 3; Hale Bailments, p. 103; Schouler Bailments (3d ed.), §§ 167, 168.

[4] See citations in note 3, supra. For distinction between chattel mortgage and pledge, see American Pig Iron &c. Co. v. German, 126 Ala. 194, 28 So. 603, 85 Am. St. 21 note, 4 L. R. A. 305. See Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

[5] Schouler Bailments Including Carriers (1905), § 140. See also, Wright v. Ross, 36 Cal. 414; Com-

§ 44. **Essentials of the relation.**—It is essential, in addition to the elements common to all bailments, that there should be a mutual agreement of the parties—for a pledge cannot be created by operation of law, though it may be implied from the conduct of the parties[6]—and that there be a debt or obligation to be secured.

§ 45. **What debt may be secured.**—The debt secured may be that of the pledgor, or of some other person, if there is assent by all parties.[7] Either a future[8] or a past[9] obligation may be secured; or many debts and not one only;[10] and the security may be absolute, or conditional, for a limited or an indefinite time.[11] The parties may have an agreement by which the subject of the pledge may become security for debts which may arise between them from time to time.[12] But when a pledge has been

stock v. Smith, 23 Maine 202; Wilkie v. Day, 141 Mass. 68, 6 N. E. 542; Partee v. Bedford, 51 Miss. 84; Harris & Co. v. Lombard, 60 Miss. 29; Wood v. Matthews, 73 Mo. 477; Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307n; McCoy v. Lassiter, 95 N. Car. 88; British Columbia Bank v. Marshall, 8 Sawyer (U. S.) 29. If there is doubt as to whether a transaction is a pledge or chattel mortgage, the law favors the conclusion that it is a pledge. Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250, Ann. Cas. 1912B. 957, and see note for distinction between pledge and chattel mortgage.

[6] Hale Bailments, § 26; Schouler Bailments (3d ed.), § 179; Wilkinson v. Misner, 158 Mo. App. 551, 138 S. W. 931; Means v. Bank of Randall, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. ed. 1107.

[7] Price v. Dime Savings Bank, 124 Ill. 317, 15 N. E. 754, 7 Am. St. 367; Britton v. Harvey, 47 La. Ann. 259, 16 So. 747; Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74.

[8] Merchants' Nat. Bank v. Demere, 92 Ga. 735, 19 S. E. 38; Clymer v. Paterson, 52 N. J. Eq. 188, 27 Atl. 645; Merchants Nat. Bank v. Hall, 83 N. Y. 338, 38 Am. Rep. 434; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Leonard v. Kebler's Admr., 50 Ohio St. 444, 34 N. E. 659.

[9] Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Conard v. Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; D'Wolf v. Harris, 4 Mas. (U. S.) 515, Fed. Cas. No. 4221, affd. 4 Pet. (U. S.) 147, 7 L. ed. 811. An existing overdue note is sufficient consideration for the pledge of stock as security for its payment. State Banking & Trust Co. v. Taylor, 25 S. Dak. 577, 127 N. W. 590, 29 L. R. A. (N. S.) 523.

[10] Mechanics' &c. Bank v. Livingston, 6 Misc. (N. Y.) 81, 55 N. Y. St. 394, 26 N. Y. S. 25; Jones v. Merchants' Nat. Bank, 72 Hun (N. Y.) 344, 25 N. Y. S. 660, 55 N. Y. St. 365.

[11] Stevens v. Bell, 6 Mass. 339; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Shirras v. Craig, 7 Cranch (U. S.) 34, 3 L. ed. 260.

[12] Norton v. Plumb, 14 Conn. 512; Hallowell v. Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315; Fall River Bank v. Slade, 153 Mass. 415, 26 N. E. 843, 12 L. R. A. 131n; Merchants Nat. Bank v. Hall, 83 N. Y. 338, 38 Am. Rep. 434.

made to secure one debt, the pledgee is not authorized to detain the property to secure a former debt,[13] or a subsequent debt,[14] unless the parties so intended. Even if the debt is void because of illegality of consideration, the pledge may be good, for though the pledgee cannot recover on the debt, he can retain the pledge until it is redeemed, and the pledgor cannot recover possession without redeeming, for to do so he must set up his own wrong,[15] and likewise the pledgee cannot set up the illegal contract to prevent redemption.[16]

§ 46. What may be pledged.—Corporeal personal property may be pledged.[17] Almost any form of incorporeal property and choses in action may also be pledged, including bills and notes,[18] coupon bonds and government securities,[19] municipal claim vouchers,[20] shares of stock,[21] chattel mortgages of every kind,[22] title-deeds,[23] a savings-bank deposit,[24] judgments,[25] bonds secured with a mortgage on personal property and corporate franchises,[26] the gross receipts of a railway corporation,[27] even

[13] Mahoney v. Caperton, 15 Cal. 313; Russell v. Hadduck, 8 Ill. 233, 44 Am. Dec. 693; Jarvis v. Rogers, 15 Mass. 389; Robinson v. Frost, 14 Barb. (N. Y.) 536; Philler v. Jewett, 166 Pa. St. 456, 31 Atl. 204; Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115.

[14] Midland Co. v. Huchberger, 46 Ill. App. 518; Baldwin v. Bradley, 69 Ill. 32; Gilliat v. Lynch, 2 Leigh (Va.) 493.

[15] Taylor v. Chester, L. R. 4 Q. B. 309; King v. Green, 6 Allen (Mass.) 139. It is held that a pledge to secure a gambling debt is void, in Menard v. Wacker, 32 Nev. 169, 105 Pac. 287, Ann. Cas. 1912C. 710.

[16] Jones Pledges, § 354; King v. Green, 6 Allen (Mass.) 139.

[17] Schouler Bailments (3d ed.), § 172. The rails and rolling stock of a railway laid for a temporary purpose on another's ground, being personal property, may be pledged. Woodward v. American Exposition R. Co., 39 La. Ann. 566, 2 So. 413.

[18] Smithurst v. Edmunds, 14 N. J. Eq. 408; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Houser v. Kemp, 3 Pa. St. 208.

[19] Loomis v. Stave, 72 Ill. 623; Morris Canal Co. v. Lewis, 12 N. J. Eq. 323; Strong v. Nat. Bank Assn., 45 N. Y. 718; Texas Banking Co. v. Turnley, 61 Tex. 365.

[20] Talty v. Freedman's Savings Trust Co., 93 U. S. 321, 23 L. ed. 886.

[21] Halliday v. Holgate, L. R. 3 Ex. 299; Worthington v. Tormey, 34 Md. 182; Pinkerton v. Manchester & L. R. R., 42 N. H. 424; Conyngham's Appeal, 57 Pa. St. 474; Stone v. Brown, 54 Tex. 330; Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146.

[22] Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Fraker v. Reeve, 36 Wis. 85.

[23] In re Kerr, L. R. 8 Eq. 331; English v. McElroy, 62 Ga. 413.

[24] Boynton v. Payrow, 67 Maine 587.

[25] Hanna v. Holton, 78 Pa. St. 334, 21 Am. Rep. 20.

[26] White Mountains R. v. Bay State Iron Co., 50 N. H. 57; Potter v. Thompson, 10 R. I. 1.

[27] West Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 111 Am. St. 362.

a lease, regarded as a chattel real,[28] or a mortgage of real estate, which before foreclosure is personal property,[29] a life insurance policy,[30] a policy of fire or marine insurance.[31] So an interest in a limited partnership may be pledged,[32] or by written assignment a book account[33] or some claim or demand,[34] bills of lading,[35] and warehouse receipts.[36] What is not in existence cannot be the subject of a pledge, whether it has ceased to exist, or has not come into being,[37] and yet there may be a contract to pledge the product in future of something to which one holds a present right, like the prospective earnings of a contract, a crop severed from land, milk from cows, wool from sheep, or goods to be manufactured, and when the property comes into existence, and the pledgee takes possession, the pledge is consummated.[38] Property exempt from execution may be pledged.[39] By statute, the pledge of the pay of soldiers[40] and United States pensions[41] is forbidden.

§ 47. **Title necessary to pledge goods.**—The pledgor need not be the absolute owner of the goods pledged.[42] The holder of a limited interest, as the owner of a life interest,[43] or a pledgee[44] may pledge what interest he has, and in case of de-

[28] Dewey v. Bowman, 8 Cal. 145.

[29] Campbell v. Parker, 9 Bosw. (N. Y.) 322; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Wells v. Wells, 53 Vt. 1.

[30] West v. Carolina Life Ins. Co., 31 Ark. 476; Soule v. Union Bank, 45 Barb. (N. Y.) 111; Hakes v. Myrick, 69 Iowa 189, 28 N. W. 575.

[31] Latham v. Chartered Bank of India, L. R. 17 Eq. 205; Merrifield v. Baker, 9 Allen (Mass.) 29.

[32] Collin's Appeal, 107 Pa. St. 590, 52 Am. Rep. 479.

[33] Works v. Merritt, 105 Cal. 467, 38 Pac. 1109.

[34] Taylor v. Turner, 87 Ill. 296; Hathaway v. Haynes, 124 Mass. 311; Commonwealth v. Suffolk Trust Co., 161 Mass. 550, 37 N. E. 757; Marine Bank v. Fiske, 71 N. Y. 353.

[35] Lickbarrow v. Mason, 1 H. Bl. 357; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. 276; Neill v. Rogers Bros.' Produce Co., 41 W. Va. 37, 23 S. E. 702.

[36] Cleveland v. Shoeman, 40 Ohio St. 176.

[37] Schouler Bailments (3d ed.), §§ 174, 175.

[38] Schouler Bailments (3d ed.), § 175; Goddard Bailments, § 74.

[39] Jones v. Scott, 10 Kans. 33; Frost v. Shaw, 3 Ohio St. 270.

[40] U. S. Comp. Stat., 1901, § 1291.

[41] U. S. Comp. Stat., 1901, § 4745.

[42] See note, 3 Am. St. 204. A partner may not pledge partnership property for his individual debts. Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. 363. And a joint owner in possession, though he may pledge his own interest, may not pledge that of his co-owner, without the latter's consent. Frans v. Young, 24 Iowa 375.

[43] Hoare v. Parker, 2 T. R. 376.

[44] McCombie v. Davies, 7 East 5; Jarvis v. Rogers, 15 Mass. 389; Lewis v. Mott, 36 N. Y. 395; Nat. Bank of Pulaski v. Winston, 5 Baxt. (Tenn.) 685.

fault, the pledgee may sell such interest, though he cannot sell the absolute property, and destroy the rights of the true owner.[45] At common law, a lienholder cannot make a valid pledge of the property on which he holds a lien, for such is a personal right, and cannot be assigned.[46] So a factor, though the holder of a lien for advances, has not the right at common law to pledge his principal's goods,[47] yet by statute in some states both the factor and the ordinary lienholder have been given the right to pledge goods.[48] So it has been held that the owner of goods who clothes another with the indicia of ownership cannot take them from a bona fide pledgee without notice,[49] as where the vendee of a conditional sale has pledged goods.[50] If goods obtained from the owner by fraud are pledged, the pledgee can enforce his rights as against the owner,[51] but if stolen goods are pledged, the pledgee has no rights against the owner.[52] In the first case, though the owner's consent was obtained by fraud, yet he consented to the passing of the goods from his possession, while in the second he has in no manner consented. The pledge of a negotiable instrument not overdue gives to the bona fide pledgee

[45] Jones Pledges, § 60; Robertson v. Wilcox, 36 Conn. 426.

[46] McCombie v. Davies, 7 East 5.

[47] Hale Bailments, p. 114, and cases cited; Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223; Gray v. Agnew, 95 Ill. 315; Hoffman v. Noble, 6 Metc. (Mass.) 68, 39 Am. Dec. 711; Kennedy v. Strong, 14 Johns. (N. Y.) 128; McCreary v. Gaines, 55 Tex. 485, 40 Am. Rep. 818; Warner v. Martin, 11 How. (U. S.) 209, 13 L. ed. 667; note 45 Am. St. 204.

[48] Ordinary Lienholders, Civ. Code Cal. (1906), § 2990; Civ. Code Dak. (1883), § 1761; Louisiana Laws 1874, No. 66; Maryland Pub. Gen. Laws (1904), pp. 204-205, §§ 1-5; Massachusetts Rev. Stat. (1902), ch. 68; Factors, New York, 3 Rev. Stat., (1901), p. 4020, § 72; Ohio Rev. Stat. (1905), §§ 5142-48; Pennsylvania, Brightley's Purdon's Dig. (1873), p. 664; Rhode Island Gen. Laws (1909), p. 612, ch. 187; Wisconsin Rev. Stat., (1898), §§ 3345-3347. See Weiner v. Harris (1910), 1 K. B. 285, 18 Am. & Eng. Ann. Cas. 87.

[49] Babcock v. Lawson, 4 Q. B. Div. 394; Morsch v. Lessig, 45 Colo. 168, 100 Pac. 431; Branson v. Heckler, 22 Kans. 610; Agnew v. Johnson, 22 Pa. St. 471, 62 Am. Dec. 303; Reynolds v. Witte, 13 S. Car. 5. 36 Am. Rep. 678; Calais Steamboat Co. v. Scudder, 2 Black (U. S.) 372, 17 L. ed. 282.

[50] Michigan C. R. Co. v. Phillips, 60 Ill. 190; Western Union R. Co. v. Wagner, 65 Ill. 197.

[51] Duell v. Cudlipp, 1 Hilt. (N. Y.) 166; Hoffman v. Carow, 22 Wend. (N. Y.) 285.

[52] White v. Garden, 10 C. B. 919; Parker v. Patrick, 5 T. R. 175; Wood v. Yeatman, 15 B. Mon. (Ky.) 270; Caldwell v. Bartlett, 3 Duer (N. Y.) 341; Mowrey v. Walsh, 8 Cow. (N. Y.) 238; Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 64 N. E. 518, 58 L. R. A. 620, 90 Am. St. 586; Arendale v. Morgan, 5 Sneed (Tenn.) 703. See Menard v. Wacker, 32 Nev. 169, 105 Pac. 287, Ann. Cas. 1912C. 710, as to pledge by clerk of an employer's money without employer's knowledge.

without notice full rights, even if such instrument was stolen,[53] and a pledge by the owner's agent in possession will protect a bona fide pledgee, even if the agent's actual authority was insufficient.[54] An administrator or executor may make a valid pledge of property belonging to the estate, within the range of his authority.[55] A receiver may pledge property of the corporation.[56]

§ 48. **Delivery in pledge.**—The pledge or bailment relation does not commence until there is an actual transfer of possession. Prior to such transfer there may exist an executory contract to pledge, for breach of which, if founded upon sufficient consideration, the courts will award damages to either party for the other's failure to perform,[57] or in some cases equity may decree specific performance. The element essential to create the pledgee's right in the goods pledged is transfer of possession, and, in general, a pledge does not exist unless the pledgee has possession and actual control of the property.[58] Delivery to the pledgee, and his acceptance and continued possession are the only notice to the world in general of the pledgee's rights, and these take the place of the recording of a mortgage, or the filing of

[53] Sheffield v. London Bank, 13 App. Cas. 333; Bealle v. Southern Bank, 57 Ga. 274; Fisher v. Fisher, 98 Mass. 303; Farwell v. Importers' & Traders' Nat. Bank, 90 N. Y. 483.

[54] Goldstein v. Hort, 30 Cal. 372; Jarvis v. Rogers, 13 Mass. 105. See note 14 L. R. A. 234.

[55] Russell v. Plaice, 18 Beav. 21; Pickens v. Yarborough's Admr., 26 Ala. 417, 62 Am. Dec. 728; Carter v. Manufacturers' Nat. Bank, 71 Maine 448, 36 Am. Rep. 338; Hutchins v. State Bank, 12 Metc. (Mass.) 421; Tuttle v. First Nat. Bank of Greenfield, 187 Mass. 533, 73 N. E. 560, 105 Am. St. 420; Leitch v. Wells, 48 N. Y. 585; In re Woods' Appeal, 92 Pa. St. 379, 37 Am. Rep. 694. See Solomon v. Altenborough (1912), 1 Ch. 451. Ann. Cas. 1912C. 975 and note.

[56] State Bank of Va. v. Domestic &c. Co., 99 Va. 411, 39 S. E. 141, 86 Am. St. 891.

[57] Schouler Bailments Including Carriers (1905), § 156; Schouler Bailments (3d ed.), § 188.

[58] Schouler Bailments Including Carriers (1905), § 156; Schouler Bailments (3d ed.), § 188; Van Zile Bailments (2d ed.), § 237a; Dunn v. Train, 125 Fed. 221, 60 C. C. A. 113; American Can Co. v. Erie Preserving Co., 183 Fed. 96, 105 C. C. A. 388; Corbett v. Underwood, 83 Ill. 324, 25 Am. Rep. 392; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; In re Lanaux's Succession, 46 La. Ann. 1036, 15 So. 708, 25 L. R. A. 577; Moors v. Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. 460; Harding v. Eldridge, 186 Mass. 39, 71 N. E. 115; Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225; Buffalo German Ins. Co. v. Third Nat. Bank, 162 N. Y. 163, 56 N. E. 521, 48 L. R. A. 107; Virginia-Carolina Chemical Co. v. McNair, 139 N. Car. 326, 51 S. E. 949; Nashville Trust Co. v. First Nat. Bank, 123 Tenn. 617, 134 S. W. 311; Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. 306, 37 L. R. A. 166, 60 Am. St. 143.

a lien.[59] Delivery may be made by an agent of the pledgor,[60] or to an agent of the pledgee,[61] and it has been held that a clerk of the pledgor may hold goods as the agent of the pledgee, his special possession for the pledgee being distinct from his duties as clerk.[62] And even the pledgor himself, as between the parties, may hold as the agent of the pledgee.[63] It is said by Mr. Schouler, in a recent text-book, "Two leading conclusions may be drawn from the precedents which form the modern mosaic of pledge delivery. 1. That in the growing complexity of commercial and mercantile transactions, with so many new classes of incorporeal rights coming into the list of things personal, the disposition increases to apply to all chattel transfers the test of mutual intent on equitable considerations; so that the English and American courts, while abating little of the common-law theory that full change of possession must attend every pledge transaction, have come to swerve very far from it in practice. 2. That, with the present laxity of construction, pledge delivery seems to comport itself differently under these three leading aspects: (a) As between the pledge parties themselves, (b) as between the pledge parties and the pledgor's general creditors, and (c) as between pledge parties and those like a pledgor's attaching creditors or purchasers, or new parties lending on security of the thing, who acquire intervening rights in rem without notice. Moreover, as we have seen, (d) the element of notice to stakeholder, custodian, or debtor is in many transactions a vital one; and the pledgee's rights as concerns such a party require consideration."[64] With these principles in mind, we shall consider some of the various kinds of delivery which have been held good by the courts in relation to various ones of these three classes.

[59] See Van Zile Bailments (2d ed.), § 237a, and cases cited in note 58 supra. Actual and continuous possession of the pledged article by the pledgee is essential to preserve his lien. Gamson v. Pritchard, 210 Mass. 296, 96 N. E. 715.

[60] Cartwright v. Wilmerding, 24 N. Y. 521. See note, 14 L. R. A. 234.

[61] Weens v. Delta Moss Co., 33 La. Ann. 973; Boynton v. Payrow, 67 Maine 587; Brown v. Warren, 43 N. H. 430; City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Johnson v. Smith, 11 Humph. (Tenn.) 396.

[62] Sumner v. Hamlet, 12 Pick. (Mass.) 76; Combs v. Tuchelt, 24 Minn. 423.

[63] Cooper v. Ray, 47 Ill. 53; Parshall v. Eggert, 54 N. Y. 18; In re Rawson, 2 Lowell (U. S.) 519.

[64] Schouler Bailments Including Carriers (1905), § 166.

§ 49. **Constructive delivery.**—The general rule is that there must be actual delivery of corporeal chattels, and yet constructive delivery of these is good between the parties.[65] Where property is in the possession of a third party, actual delivery to the pledgee is not necessary, but an order to the keeper, or notice to the keeper of a written pledge contract, may constitute constructive delivery, and thus the keeper becomes the agent of the pledgee in caring for the goods.[66] The pledgee may be already in possession of the goods, for some other purpose or other pledge, and in such case, a pledge contract between the parties operates as a constructive transfer.[67] So goods in a warehouse may be delivered in pledge by the transfer of a receipt with such intention, and goods on board a vessel at sea, or on a train in transit, by delivery of the bill of lading,[68] and the delivery of the key of a warehouse in which goods are stored is a symbolical delivery of the goods.[69]

§ 50. **Certain kinds of constructive delivery not good as to creditors.**—Though, where a public warehouseman executes and delivers to his creditor a receipt for property contained

[65] City Fire Ins. Co. v. Olmsted, 33 Conn. 476; Tuttle v. Robinson, 78 Ill. 332; Keiser v. Topping, 72 Ill. 226; In re Collins Appeal, 107 Pa. St. 590, 52 Am. Rep. 479; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779. A setting apart of certain property as a pledge or security is a sufficient delivery as between the parties. F. P. Gluck Co. v. Therme (Iowa), 134 N. W. 438.

[66] Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Hathaway v. Haynes, 124 Mass. 311; First Nat. Bank v. Kelly, 57 N. Y. 34; Cartwright v. Wilmerding, 24 N. Y. 521; First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408; Freiburg v. Dreyfus, 135 U. S. 478, 24 L. ed. 206, 10 Sup. Ct. 716; Dows v. Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214.

[67] Story Bailments (9th ed.), § 297; Brown v. Warren, 43 N. H. 430; Van Blarcom v. Broadway Bank, 37 N. Y. 540. Where a manufacturer was to bill his goods to his agent and store them in a separate warehouse for him upon his making advances, equity considers the property set aside when the invoices are sent, though not actually set apart, and such delivery to the pledgee is good against the manufacturer's receiver. Garrison v. Vermont Mills, 154 N. Car. 1, 69 S. E. 743, 31 L. R. A. (N. S.) 450.

[68] Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; First Nat. Bank v. Crocker, 111 Mass. 163; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Third Nat. Bank v. Hays, 119 Tenn. 729, 108 S. W. 1060, 14 Am. & Eng. Ann. Cas. 1049; Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123; Rice v. Cutler, 17 Wis. 351, 84 Am. Dec. 747n.

[69] Ryall v. Rolle, 1 Atk. 165; Chaplin v. Rogers, 1 East 192; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364n.

in his warehouse and owned by him in order to secure a debt by a lien upon the property, it is a valid constructive delivery which operates as a pledge,[70] one not a public warehouseman cannot make a pledge valid against creditors by issuing and delivering certificates similar to the receipts of public warehousemen, purporting to cover property in the pledgor's possession, where there is nothing outside the certificate to indicate the intention to create a pledge.[71] A contract assigning a liquor license as collateral security is not valid as against creditors where it is neither executed, acknowledged, filed nor recorded, as required by law, and the license is left in possession of the assignor.[72] A book account cannot be pledged by a mere delivery of a copy of it, without delivery of the book itself, or any assignment in writing of the owner's right, as against a bank which without notice collects the account from the debtor through a general arrangement with the pledgor, the debtor and the collecting bank having no notice of the attempted pledge.[73] When a manufacturing company enters into an arrangement with a warehouse company by which the latter issues receipts to the former for a portion of its manufactured goods which are left in the possession of the manufacturer, and stored on premises occupied by it, under a lease purporting to be for the warehouse company, the transfer of such receipts as collateral for loans does not create a valid pledge of the goods, as against the trustee in bankruptcy of the manufacturer.[74] Where a statute provides for recording of charges upon personal property unless accompanied by actual possession, a bank cannot, by setting aside in its vaults certain securities to secure mortgage certificates of deposit, create a superior right to these

[70] State v. Robb-Lawrence Co., 17 N. Dak. 257, 115 N. W. 846, 16 L. R. A. (N. S.) 227 and note.

[71] Fourth Street Nat. Bank v. Taylor, 172 Fed. 177, 96 C. C. A. 629, 30 L. R. A. (N. S.) 552 and note; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. 306, 37 L. R. A. 166, 60 Am. St. 143.

[72] Deggender v. Seattle Brewing & Malting Co., 41 Wash. 385, 83 Pac. 898, 4 L. R. A. (N. S.) 626.

[73] American Exchange Nat. Bank v. Federal Nat. Bank, 226 Pa. 483, 75 Atl. 683, 27 L. R. A. (N. S.) 666 and note, 134 Am. St. 1071, 18 Am. & Eng. Ann. Cas. 444.

[74] Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. 720, 11 Am. & Eng. Ann. Cas. 789.

holders of certificates as against the assignee for the benefit of general creditors.[75]

§ 51. **Delivery of negotiable instruments in pledge.**—A negotiable instrument requiring indorsement to make a valid transfer should be indorsed and actually delivered in order to make a valid pledge good as to everybody.[76] In one or two jurisdictions, however, it is held that such an instrument may be pledged by delivery and acceptance and the pledge is good against subsequent creditors.[77] A pledge of negotiable paper good between the parties but subject to outstanding equities may be made by mere delivery to the pledgee.[78] Where a bona fide pledgee of negotiable instruments has received them in the due course of business, before maturity, for a valuable consideration, and without notice of any equities, he is a pledgee for value, and is entitled to the same rights against the holders of equities unknown to him which a purchaser of the paper could claim under like circumstances.[79] He is under the same duties as a purchaser to inquire if there is anything upon the face of the paper which would cause a reasonably prudent man to make inquiry, and for failure to inquire is held to notice of whatever he would have ascertained by investigation.[80] There is a conflict among the authorities as to whether a pre-existing debt is such a considera-

[75] Burnes v. Daviess County Bank &c. Co., 135 Ky. 355, 122 S. W. 182, 25 L. R. A. (N. S.) 525, 135 Am. St. 467.

[76] Van Zile Bailments (2d ed.), § 242.

[77] Smith v. Jennings, 74 Ga. 551; Casey v. Schneider, 96 U. S. 496, 24 L. ed. 790.

[78] Coombs v. Warren, 34 Maine 89; Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Van Riper v. Baldwin, 19 Hun (N. Y.) 344, 85 N. Y. 618. See also, Morris v. Preston, 93 Ill. 215; Tucker v. New Hampshire Sav. Bank, 58 N. H. 83, 42 Am. Rep. 580.

[79] Exchange Bank v. Butner, 60 Ga. 654; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Warner v. Fourth Nat. Bank, 115 N. Y. 251, 22 N. E. 172; Kempner v. Comer, 73 Tex. 196; Oates v. First Nat. Bank of Montgomery, 100 U. S. 239, 25 L. ed. 580; Kinney v. Kruse, 28 Wis. 183. Where the owner of negotiable paper indorsed it in blank and deposited it in a bank for safe-keeping and an officer of the bank misappropriated it wrongfully and pledged it, the pledgee's right is superior to the owner's, even though the bank officer has, ostensibly for collection, recovered the instrument and restored it to its owner. Voss v. Chamberlain, 139 Iowa 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106n, 130 Am. St. 331; Boston Steel & Iron Co. v. Stener, 183 Mass. 140, 66 N. E. 646, 97 Am. St. 426; New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. 880.

[80] First Nat. Bank v. National Broadway Bank, 22 App. Div. (N. Y.) 24, 81 N. Y. St. 880, 47 N. Y. S. 880.

tion for the pledge of negotiable paper that the pledgee under such circumstances becomes a holder for value, protected against prior equities. All courts would hold such a consideration good between the parties to the pledge, but it seems that the better rule is that unless the pledgee has surrendered something to the pledgor, and the pledgor has gained something in return for the pledge, there is no such consideration moving between the parties as will give the pledgee any better right than the pledgor had.[81] But eminent authorities hold the contrary view, that a pre-existing debt is a valuable consideration for the pledge of negotiable securities, and protects the pledgee from all prior equities.[82] And where the pledgor has surrendered other securities of value or extended the time of payment, or where the original debt has been actually extinguished, this is a sufficient consideration to make the transferee a holder for value.[83] Where a note is invalid between the parties the holder of the same as collateral may not recover the entire amount of the note, but only the amount to which it is collateral.[84]

§ 52. **Pledge of corporate stock.**—It was once thought that, since a valid pledge requires the delivery of the property by the pledgor to the pledgee, there could be no pledge of corporate stock. But it is now held that it can be pledged by transfer of possession of the certificate. Mere manual transfer of the certificate is not sufficient,[85] but there must be a transfer

[81] Schloss v. Feltus, 103 Mich. 525, 61 N. W. 663, 36 L. R. A. 161n; Phœnix Ins. Co. v. Church, 81 N. Y. 218, 59 How. Pr. (N. Y.) 293, 37 Am. Rep. 494; Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54; Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142. See note 31 L. R. A. (N. S.) 287.

[82] Exchange Nat. Bank v. Coe, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287 and note; National Bank of St. Joseph v. Dakin, 54 Kans. 656, 39 Pac. 180, 45 Am. St. 299; Merchants' Ins. Co. v. Abbott, 131 Mass. 397; Spaulding v. Kendrick, 172 Mass. 71, 51 N. E. 453; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865; Brooklyn City &c. R. Co. v. National Bank of Republic, 102 U. S. 14, 26 L. ed. 61.

[83] Goodwin v. Conklin, 85 N. Y. 21; Mayer v. Heidelbach, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850. Time of payment extended. Farmers' Nat. Bank v. McCall, 25 Okla. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217. Note of third party taken in lieu of former collateral released is valid consideration. Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 87 N. E. 297, 32 L. R. A. (N. S.) 858n.

[84] Benton v. Sikyta, 84 Nebr. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057.

[85] Wagner v. Marple, 10 Tex. Civ. App. 505, 31 S. W. 691. See note, 57 Am. St. 389.

in writing.[86] Transfer by indorsement and upon the books of the company to be held by the pledgee as a pledge is of course a sufficient delivery, but this is not necessary to create a valid pledge, for indorsement of the certificate in blank and its delivery to the pledgee is sufficient, as this procedure authorizes the pledgee to write over the signature of the owner a full assignment and directions to transfer on the books, such a usage being well recognized in business,[87] and the pledgee's rights under such a transfer are superior to those of subsequent attaching creditors,[88] unless the statute or the charter of the corporation requires that a transfer must be recorded on its books to be valid.[89] The pledgee of stock has the same right as the owner to protect the assets of the corporation.[90] If he appears on the books of the corporation as the owner of the stock, he is liable as a stockholder to its creditors,[91] and liable for assessments,[92] and has the right

[86] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Nisbit v. Macon Bank & Trust Co., 12 Fed. 686, 4 Woods (U. S.) 464; Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; French v. White, 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, and note.

[87] McFall v. Buckeye Grangers &c. Assn., 122 Cal. 468, 55 Pac. 253, 68 Am. St. 47; Mt. Holly &c. Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Kortright v. Buffalo Commercial Bank, 20 Wend. (N. Y.) 91; German Union Bldg. &c. Assn. v. Sendmeyer, 50 Pa. St. 67.

[88] Scott v. Pequonnock Nat. Bank, 15 Fed. 494; Mapleton Bank v. Standrod, 8 Idaho 740, 71 Pac. 152, 67 L. R. A. 656 and note; Boston Music Hall Assn. v. Cory, 129 Mass. 435; Everett v. Farmers' &c. Bank, 82 Nebr. 191, 117 N. W. 401, 20 L. R. A. (N. S.) 996 and note; State Banking & Trust Co. v. Taylor, 25 S. Dak. 577, 127 N. W. 590, 29 L. R. A. (N. S.) 523.

[89] Parrott v. Byers, 40 Cal. 614; Fisher v. Essex Bank, 5 Gray (Mass.) 373; Scripture v. Francestown Soapstone Co., 50 N. H. 571; Van Zile Bailments (2d ed.), § 251.

[90] Andrews Co. v. Columbus Nat. Bank, 129 Ga. 53, 58 S. E. 633, 12 Am. & Eng. Ann. Cas. 616, 121 Am. St. 186n, and exhaustive note upon liabilities and duties of pledgee of corporate stock; Green v. Hedenberg, 159 Ill. 489, 50 Am. St. 178, 42 N. E. 851; Cream City Mirror Plate Co. v. Coggeshall, 142 Wis. 651, 126 N. W. 44, 135 Am. St. 1091.

[91] National Commercial Bank v. McDonnell, 92 Ala. 387, 9 So. 149; Adams v. Clark, 36 Colo. 65, 85 Pac. 642, 10 Am. & Eng. Ann. Cas. 774, and note; Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. 362; Tierney v. Ledden, 143 Iowa 286, 121 N. W. 1050, 21 Am. & Eng. Ann. Cas. 105; Flynn v. American Banking & Trust Co., 104 Maine 141, 69 Atl. 771, 19 L. R. A. (N. S.) 428, 129 Am. St. 378; Marshall Field & Co. v. Evans &c. Co., 106 Minn. 85, 118 N. W. 55, 19 L. R. A. (N. S.) 249 and note; Simmons v. Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476; Pullman v. Upton, 96 U. S. 328, 24 L. ed. 818; note, 121 Am. St. 197.

[92] Welles v. Larrabee, 36 Fed. 866, 2 L. R. A. 471; Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448; Bowden v. Johnson, 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. 246. The pledgee of bank stock takes subject to the statutory right of the bank to forfeit the stock for nonpayment of assessments. Corbin Bkg. Co. v.

to vote the stock.[93] If the transfer is not on the books,[94] or the stock is transferred to him as pledgee,[95] he is not liable as a stockholder. The pledgee of stock by indorsement may transfer it and give good title to a bona fide purchaser.[96] The pledgee has the right to collect dividends accruing on the stock while he holds it.[97]

§ 53. **Delivery of bills of lading, and other quasi-negotiable papers.**—The transfer of a bill of lading in a manner which will give to the pledgee possession and control of the property which it represents is necessary to constitute a valid pledge, but this may be symbolical. The general rules as to transfer of title by bill of lading, discussed later in the chapter on Carriers, are entirely applicable.[98] In certain instances a mere delivery of the bill with intention to pledge, has been held good[99] and delivery of the bill indorsed in blank with a similar intention is a sufficient delivery.[1] A warehouse receipt may be delivered in pledge with an indorsement in blank,[2] and a mere delivery of such re-

Mitchell, 141 Ky. 172, 132 S. W. 426, 31 L. R. A. (N. S.) 446. See note, 39 L. R. A. (N. S.) 292.

[93] Haynes v. Griffith, 16 Idaho 280, 101 Pac. 728; Commonwealth v. Dalzell, 152 Pa. St. 217, 25 Atl. 535, 34 Am. St. 640. See Cohen v. Big Stone Gap Iron Co., 111 Va. 468, 69 S. E. 359, Ann. Cas. 1912, 203 and note.

[94] Welles v. Larrabee, 36 Fed. 866, 2 L. R. A. 471; Henkle v. Salem Mfg. Co., 39 Ohio St. 547.

[95] Marshall Field & Co. v. Evans &c. Co., 106 Minn. 85, 118 N. W. 55, 19 L. R. A. (N. S.) 249, and note. Though stock was issued by a corporation directly to the person named as holder, yet if it was issued to him to secure the performance of an agreement, he is a pledgee only, and not liable to creditors as a stockholder. Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933, 107 Am. St. 335. The pledgee takes only a special interest in such case. Baker v. Old Nat. Bank, 86 Fed. 1006; Pauly v. State Loan &c. Co., 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. 465; White R. S. Bank v. Capital Sav. Bank, 77 Vt. 123, 59 Atl. 197, 107 Am. St. 754.

[96] Gurley v. Reed, 190 Mass. 509, 77 N. E. 642; Newton v. Fay, 10 Allen (Mass.) 505; Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187; Brick v. Brick, 98 U. S. 514, 25 L. ed. 256.

[97] Maxwell v. Greenville Nat. Bank, 70 S. Car. 532, 50 S. E. 195, 3 Am. & Eng. Ann. Cas. 723.

[98] See § 140 et seq.

[99] Peters v. Elliott, 78 Ill. 321; Frederick v. Knox, 53 Md. 612; First Nat. Bank v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92; First Nat. Bank of Cairo v. Crocker, 111 Mass. 163; Scharff v. Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. 672, 42 Cent. L. J. 367; Richardson v. Nathan, 167 Pa. St. 513, 31 Atl. 740; Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123; Neill v. Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

[1] Van Zile Bailments (2d ed.), § 254.

[2] Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Freiburg v. Dreyfus, 135 U. S. 478, 34 L. ed. 206, 10 Sup. Ct. 716;

ceipt without indorsement with the intention to pledge is good between the parties.[3] Likewise, a sufficient pledge of an insurance policy may be made by indorsement in blank and delivery.[4] The delivery in pledge of a note secured by a mortgage carries with it the mortgage security;[5] but a delivery of the mortgage unaccompanied by delivery of the evidences of the debt secured conveys no right.[6]

§ 54. Pledgee's right to possession of pledge.—The pledgee has the right to exclusive possession of the thing pledged, and this right is good against all the world, including the pledgor, during the time for which it was pledged, and continues until the obligation which the pledge is to secure is fully satisfied.[7] To maintain his rights the pledgee may bring replevin against one who tortiously deprives him of possession,[8] or may bring trover for a conversion[9] and as against a third party may recover, in the latter action, the full value of the thing pledged, being held a trustee for the pledgor as to any amount in excess of his lien,[10] but if the pledgor unwarrantedly interferes with his possession he may recover from him only to the extent of his special interest.[11] The pledgee loses his right to possession by redelivery to the pledgor with the intention of abandoning such possession, but not if he delivers it to him for some special purpose, after which it is to be returned,[12] or if it is delivered to the pledgor as the

Rice v. Cutler, 17 Wis. 351, 84 Am. Dec. 747; Jones Pledges, § 280.

[3] Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537; Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123.

[4] Norwood v. Guerdon, 60 Ill. 253.

[5] Van Zile Bailments (2d ed.), § 270.

[6] Colebrooke, Collateral Securities, 185; Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Wanzer v. Cary, 76 N. Y. 526.

[7] American Pig Iron Storage Warrant Co. v. German, 126 Ala. 194, 28 So. 603, 85 Am. St. 21; Fowle v. Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. 451; Coleman v. Shelton, 2 McCord Eq. (S. Car.) 126, 16 Am. Dec. 639; Yeatman v. Savings Inst., 95 U. S. 764, 24 L. ed. 589.

[8] Noles v. Marable, 50 Ala. 366.

[9] Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; United States Exp. Co. v. Meints, 72 Ill. 293.

[10] Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; United States Exp. Co. v. Meints, 72 Ill. 293; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137.

[11] Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Hurst v. Coley, 15 Fed. 645; Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670; Lyle v. Barker, 5 Bin. (Pa.) 457.

[12] Hutton v. Arnett, 51 Ill. 198; Thayer v. Dwight, 104 Mass. 254; First Nat. Bank v. Bradshaw (Nebr.), 135 N. W. 830; Hays & St. John v. Riddle, 1 Sandf. (N. Y.) 248; Casey v. Cavaroc, 96 U. S. 467, 24 L.

agent of the pledgee,[13] the pledgee's rights are at least not lost as against the pledgor. Possession by the pledgee, it seems, is essential as against third parties, though the pledgee's agent may hold possession for him.[14]

§ 55. **Pledgee's right to use—Expenses and profits.**—The pledgee has no right to use the property pledged to his personal profit, or to its injury, but only so far as is necessary in its proper care.[15] All profit or beneficial use must go to the credit of the pledgor and in fact becomes a part of the pledged property to be accounted for by the pledgee.[16] This includes the increase from herds, and milk from cows,[17] likewise dividends collected on stocks,[18] and interest on bonds,[19] and presumably, if the pledgee of a horse, or of a machine, made use of such pledge, the pledgor might, instead of suing for conversion, apply the reasonable value of such use to the reduction of the debt secured. The pledgee must bear the expenses reasonably necessary for the proper preservation of the pledge, but these become a charge against the pledgor, and a part of the debt secured, and must be repaid before the goods can be reclaimed.[20] Among such expenses are included the premiums on an insurance policy,[21] and money paid to remove an incumbrance superior to the lien of the pledge,[22] or assessments on corporate stock.[23]

ed. 779. See Manny v. Wilson, 122 N. Y. S. 16, 137 App. Div. (N. Y.) 140.

[13] See Hale Bailments, p. 172; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; First Nat. Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400; Day v. Swift, 48 Maine 368.

[14] Latta v. Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. 30; Cooley v. Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. 609; First Nat. Bank v. Caperton, 74 Miss. 857, 22 So. 60, 60 Am. St. 540.

[15] Story Bailments (9th ed.), §§ 99, 329; McArthur v. Howett, 72 Ill. 358; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Laurence v. Maxwell, 53 N. Y. 19; Thompson v. Patrick, 4 Watts (Pa.) 414.

[16] Goddard Bailments, § 82; Schouler Bailments (3d ed.), §§ 211–212; Hunsaker v. Sturgis, 29 Cal. 142; Androscoggin R. Co. v. Auburn Bank, 48 Maine 335; Merrifield v. Baker, 9 Allen (Mass.) 29.

[17] Coggs v. Bernard, 2 Ld. Raym. 909.

[18] Hunsaker v. Sturgis, 29 Cal. 142; Maxwell v. Greenville Nat. Bank, 70 S. Car. 532, 50 S. E. 195, 3 Am. & Eng. Ann. Cas. 723 and note.

[19] Androscoggin R. Co. v. Auburn Bank, 48 Maine 335.

[20] Fagan v. Thompson, 38 Fed. 467; Starrett v. Barber, 20 Maine 457; Hills v. Smith, 28 N. H. 369; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Rowan v. State Bank, 45 Vt. 160. But see Meyer v. Carmer, 135 N. Y. S. 64.

[21] Raley v. Ross, 59 Ga. 862; Rowan v. State Bank, 45 Vt. 160.

[22] Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. 624.

[23] McCalla v. Clark, 55 Ga. 53.

§ 56. **Care demanded of pledgee—Collection of negotiable paper.**—Since a pledge is a bailment for mutual benefit, the general rule applies that the pledgee is held to exercise ordinary care for the preservation and protection of the pledge, and what may be such care is dependent upon the character of the property, the situation of the parties, and other circumstances.[24] So the pledgee of negotiable paper held as collateral property is held under the duty to take the necessary steps to preserve the rights represented by the paper.[25] If it is indorsed, he must present it for payment when due, and if not paid, must give the notice necessary to charge the indorsers, or be liable for ensuing loss.[26] If a prudent man would do so, he must sue on the securities,[27] and if there is danger of loss, he should collect the collateral, even though the debt secured by the pledge is not yet due.[28] But against the pledgor the pledgee is held to only reasonable diligence in attempting to collect negotiable paper,[29] and if he uses such diligence he will not lose a right to recover on the pledge debt, even though he has failed to give notice of nonpayment to the pledgor indorser, or to have the note protested.[30]

[24] Damon v. Waldtenfel, 99 Cal. 234, 33 Pac. 903; Cooper v. Simpson, 41 Minn. 46, 42 N. W. 601, 4 L. R. A. 194, 16 Am. St. 667; Ware v. Squyer, 81 Minn. 388, 84 N. W. 126, 83 Am. St. 390; Willets v. Hatch, 132 N. Y. 41, 30 N. E. 251, 17 L. R. A. 193, and note; Cutting v. Marlor, 78 N. Y. 454.

[25] Sampson v. Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. 950; Reeves v. Plough, 41 Ind. 204; First Nat. Bank v. O'Connell, 84 Iowa 377, 51 N. W. 162, 35 Am. St. 313; Griggs v. Day, 136 N. Y. 152, 32 N. E. 612, 18 L. R. A. 120, 32 Am. St. 704 and note, affd., 137 N. Y. 542, 32 N. E. 1001; Hazard v. Wells, 2 Abb. N. Cas. (N. Y.) 444; Montague v. Stelts, 37 S. Car. 200, 15 S. E. 968, 34 Am. St. 736; Rumsey v. Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. 935. See note 32 Am. St. 711-31, 83 Am. St. 394.

[26] Lea v. Baldwin, 10 Ga. 208; Scott v. First Nat. Bank, 5 Ind. Ter. 292, 82 S. W. 751, 68 L. R. A. 488n; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; Sellers v. Jones, 22 Pa. St. 423; Swift v. Tyson, 16 Pet. (U. S.) 1, 1 Am. Lead. Cas. Eq. (5th ed.) 411, 423, note; note, 68 L. R. A. 482.

[27] Ex parte Mure, 2 Cox Ch. 63; Slevin v. Morrow, 4 Ind. 425; Joliet Iron &c. Co. v. Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 34; Hazard v. Wells, 2 Abb. N. Cas. (N. Y.) 444; Whitin v. Paul, 13 R. I. 40.

[28] Hale Bailments, p. 158; Van Zile Bailments (2d ed.), § 317; Bizzell v. Roberts, 156 N. Car. 272, 72 S. E. 378. The pledgee of a mortgage upon real estate may foreclose it upon breach of the condition of the mortgage unless prohibited by the pledge agreement. Union Trust Co. v. Hasseltine, 200 Mass. 414, 86 N. E. 777, 16 Am. & Eng. Ann. Cas. 123.

[29] Peru Van Zandt I. Co. v. Burnett (Okla.), 122 Pac. 668; First Nat. Bank of Philippi v. Kittle, 69 W. Va. 171, 71 S. E. 109, 37 L. R. A. (N. S.) 699, and full note.

[30] Westphal v. Ludlow, 2 McCrary (U. S.) 505, 6 Fed. 348; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. ed. 326. See Coleman v. Lewis, 183 Mass. 485, 67 N. E. 603, 68 L. R. A.

§ 57. **Pledgee's right to assign pledge.**—The pledge is an incident of the debt secured and assignable with it, and the assignee of the debt together with the pledge obtains all the legal rights of the pledgee, and stands in his place.[31] The assignment of the debt unaccompanied by a transfer of the pledge passes an equitable interest in the security, for the pledgee's interest in the property is dependent upon the existence of the debt.[32] But if the pledge is negotiable paper which has been transferred to a bona fide holder, the assignee of the pledge debt acquires no rights against such holder.[33] And in general the assignee to whom the pledgee has transferred the pledge obtains only the rights which the pledgee had, and no greater, unless in the case of negotiable paper taken in good faith in due course, or where the owner has clothed the pledgee with apparent authority, or the indicia of ownership.[34] So to the extent of his own interest the pledgee may repledge the property, subject to the terms and restrictions of the original pledge contract.[35]

§ 58. **Conversion by pledgee.**—Since it is the duty of the pledgee to return the pledge upon redemption, a wrongful sale of it is a conversion by him.[36] But it is optional with the pledgor whether this shall be considered a conversion, and the contract thus ended, or whether he shall keep the contract in existence.[37]

482, 97 Am. St. 450. This rule was applied to the sale of bank stock in National Exch. Bank v. Kilpatric, 204 Mo. 119, 102 S. W. 499, 120 Am. St. 689.

[31] Whitney v. Peay, 24 Ark. 22; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. 58; Bank of Forsyth v. Davis, 113 Ga. 341, 38 S. E. 836, 84 Am. St. 248; Bradley v. Parks, 83 Ill. 169; Jarvis v. Rogers, 15 Mass. 389; Chapman v. Brooks, 31 N. Y. 75; Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190; Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Van Zile Bailments (2d ed.), § 286.

[32] Homer v. Savings Bank, 7 Conn. 478; Stearns v. Bates, 46 Conn. 306; Esty v. Graham, 46 N. H. 169.

[33] Coit v. Humbert, 5 Cal. 260, 63 Am. Dec. 128; Valette v. Mason, 1 Ind. 288; Stoddard v. Kimball, 6 Cush. (Mass.) 469; Ballard v. Burgett, 40 N. Y. 314.

[34] International Bank v. German Bank, 71 Mo. 183, 36 Am. Rep. 468; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; Swan v. Produce Bank, 24 Hun (N. Y.) 277; Combes v. Chandler, 33 Ohio St. 178; Cowdrey v. Vandenburgh, 101 U. S. 572, 25 L. ed. 923.

[35] McCombie v. Davies, 7 East 5; Jarvis v. Rogers, 15 Mass. 389; Lewis v. Mott, 36 N. Y. 395.

[36] Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Dimock v. United States Nat. Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. 643; Glidden v. Mechanics' Nat. Bank, 530 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737 and note.

[37] Hale Bailments, p. 160. See cases cited in note, 43 L. R. A. 760, et seq; Dimock v. United States Nat. Bank,

If he considers it a conversion, he may either tender the amount of his debt and demand his pledge,[38] or bring an action for damages for the sale.[39] It seems that the true measure of damages for such a conversion is the market value of the property pledged at the time of the conversion.[40] Ordinarily a pledgee may not use the thing pledged without the pledgor's consent, and such use is a conversion.[41] Or if he has implied authority to use the pledge, and uses it beyond the extent of such authority, this is a conversion.[42] The pledgor need not tender the amount due on the debt in order to maintain trover against a pledgee who has put it out of his power to restore the pledge.[43] A conversion of the pledge is held to be in effect a discharge of the debt.[44]

§ 59. The pledgor's warranty of title to the pledge.— The pledgor, of course, retains the general property in the pledge, subject to the pledgee's lien. The pledgor, by entering into a pledge contract, impliedly warrants that he is the owner of the property pledged, or that he has such an interest that he is legally entitled to pledge it, in analogy to the principle of the law of sales, which holds the vendor to an implied warranty of his ownership of the thing sold; and if the pledgee is deprived of any benefit of the pledge by reason of the defective title of the

55 N. J. L. 296, 25 Atl. 926, 39 Am. St. 643. But a waiver of the conversion as to a portion of the property pledged is not a waiver of the conversion of the entire property. State v. Robb-Lawrence Co., 17 N. Dak. 257, 115 N. W. 846, 16 L. R. A. (N. S.) 227.

[38] Cooper v. Ray, 47 Ill. 53; Hope v. Lawrence, 1 Hun (N. Y.) 317; Talty v. Freedman's Savings & Trust Co., 93 U. S. 321, 23 L. ed. 886.

[39] Leighton v. Burkham, 4 Ohio C. D. 692, 7 Ohio C. C. 487; Bush v. Lyon, 9 Cow. (N. Y.) 52; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189.

[40] Belden v. Perkins, 78 Ill. 449; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497n; Fowle v. Ward, 113 Mass. 548, 18 Am. Rep. 534; Blood v. Erie Dime Savings &c. Co., 164 Pa. St. 95, 30 Atl. 362; Grimes v. Watkins, 59 Tex. 133. See Wright v. Bank of the Metropolis, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. 356n, holding that true measure is highest market value within reasonable time after owner learns of conversion.

[41] Lamb v. O'Reilly, 13 Misc. (N. Y.) 212, 68 N. Y. St. 114, 34 N. Y. S. 235; Hawkins v. Hubbard, 2 S. Dak. 631, 51 N. W. 774.

[42] Ripley v. Dolbier, 18 Maine 382.

[43] Mullen v. J. J. Quinlan & Co., 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511; Austin v. Vanderbilt, 48 Ore. 206, 85 Pac. 519, 6 L. R. A. (N. S.) 298, 10 Ann. Cas. 1123 and note, 120 Am. St. 809; note, 43 L. R. A. 759.

[44] Skud v. Tillinghast, 195 Fed. 1.

pledgor, the pledgor is liable in damages.[45] And if the pledgor has undertaken to pledge as his own the property of another without his consent, he is estopped from asserting against the pledgee that he was not the owner.[46] The pledgor may avoid the absolute warranty of title by disclosing to the pledgee when making the contract the qualified nature of his interest.

§ 60. **Pledgor's right to assign subject to pledge.**—Since the general property remains in the owner he may transfer it by a contract upon sufficient consideration, subject to the lien of the pledgee, and all the pledgee's rights.[47] The buyer may contract to take upon himself all the obligations of the pledgor, even becoming personally liable for the debt secured.[48] In order to protect his rights, the assignee of the pledgor should notify the pledgee, who then becomes the holder for the assignee, but without such notice, the pledgee would not be liable to the assignee for the return of the property to the pledgor.[49] If upon default and sale there should be a surplus, the pledgee with notice would hold such surplus for the pledgor's assignee.[50]

§ 61. **Pledgor's right to sue third parties.**—The pledgee's duty and right to protect the possession of the pledge do not prevent the pledgor from protecting his own interests, especially in case of the failure of the pledgee to do so. For instance, if the pledgee fails in his duty to collect negotiable paper when it falls due, the pledgor may proceed with its collection, or if necessary to protect his interest, may bring suit, as where notes are liable to become barred by the statute of limitations.[51]

[45] Goldstein v. Hort, 30 Cal. 372; Mairs v. Taylor, 40 Pa. St. 446.

[46] Goldstein v. Hort, 30 Cal. 372.

[47] Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. 435; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Fettyplace v. Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Bush v. Lyon, 9 Cow. (N. Y.) 52; Fletcher v. Howard, 2 Aiken (Vt.) 115, 16 Am. Dec. 686; Taggart v. Packard, 39 Vt. 628. One who purchases property from the general owner, knowing it is in the possession of another as pledgee, takes subject to the latter's rights. Carothers Warehouse Bldg. Assn. v. McConnell, 30 Okla. 394, 121 Pac. 191.

[48] Dupre v. Fall, 10 Cal. 430; Carrington v. Ward, 71 N. Y. 360.

[49] Van Blarcom v. Broadway Bank, 37 N. Y. 540; Duell v. Cudlipp, 1 Hilt. (N. Y.) 166.

[50] Van Blarcom v. Broadway Bank, 37 N. Y. 540.

[51] Schouler Bailments (3d ed.), § 204; Van Zile Bailments (2d ed.), § 277; O'Kelley v. Ferguson, 49 La. Ann. 1230, 22 So. 783.

§ 62. **The pledgor's right to redeem.**—The pledgor cannot be deprived of his right to redeem, even if he has entered into a contract creating the pledge which provides that the property shall become irredeemable upon his failure to perform the obligation secured by the pledge, for such a provision in a contract is void as against public policy.[52] But after the relation of pledgor and pledgee has been established by delivery, the pledgor may agree with the pledgee that he shall have title to the pledge if it is not redeemed by a certain time, for this is merely a conditional sale of the pledgor's interest.[53] The statute of limitations does not begin to run against the pledgor until he has made a tender of the amount of the debt, and the pledgee has refused to restore the pledge, for until that time the pledgor has no right of action against the pledgee.[54] But the pledgor cannot recover the pledge without paying the debt, even though the statute of limitations has run against the debt, for though the debt is barred, the security is still alive.[55] If the pledgee makes no demand for redemption, the pledgor has the right to redeem during his life and at his death it descends to his personal representative.[56] At common law the pledgor's interest is not subject to attachment, garnishment, or writ of execution,[57] but this has been changed by statute in many states.[58] Under none of these statutes, however, can the sale of the pledgor's interest on judicial

[52] Vickers v. Battershall, 84 Hun (N. Y.) 496, 32 N. Y. S. 314; Clark v. Henry, 2 Cowen (N. Y.) 324; Lucketts v. Townsend, 3 Tex. 119, 49 Am. Dec. 723; Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775.

[53] Beatty v. Sylvester, 3 Nev. 228.

[54] Van Zile Bailments (2d ed.), § 280; Story Bailments (9th ed.), § 346; Cross v. Eureka L. & Y. Canal Co., 73 Cal. 302, 14 Pac. 885, 2 Am. St. 808; Hancock v. Franklin Ins. Co., 114 Mass. 155; Wheeler v. Breslin, 47 Misc. (N. Y.) 507, 95 N. Y. S. 966; Whelan's Exr. v. Kingsley's Admr., 26 Ohio St. 131.

[55] Note, 95 Am. St. 662; Conway v. Caswell, 121 Ga. 254, 48 S. E. 956, 2 Am. & Eng. Ann. Cas. 269; Jones v. Merchants' Bank, 6 Rob. (N. Y.) 162. Even if by statute the pledgee's lien is lost because the debt is barred, yet the courts will not aid the pledgor to recover without paying his debt. Puckhaber v. Henry, 152 Cal. 419, 93 Pac. 114, 125 Am. St. 75, 14 Am. & Eng. Ann. Cas. 844.

[56] White River Sav. Bank v. Capital Sav. Bank &c. Co., 77 Vt. 123, 59 Atl. 197, 107 Am. St. 754.

[57] Jennings v. McIlroy, 42 Ark. 236, 48 Am. Rep. 61; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122n; Hall v. Page, 4 Ga. 428, 48 Am. Dec. 235; Soule v. White, 14 Maine 436; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 48 Am. Rep. 61.

[58] See Hale Bailments, p. 130.

process divest or diminish the interest of the pledgee, for the creditor can take no greater right than the pledgor had.[59]

§ 63. **Termination of the relation by the pledgor.**—The normal termination of a pledge relationship is through the performance by the pledgor of the obligation secured. Payment of the debt secured and expenses incurred will discharge the lien.[60] Or if the pledgee sues on the debt, and it is satisfied by the sale upon execution of other property, the property is released.[61] If the pledgor tenders the proper amount, which the pledgee refuses to accept, this is a sufficient performance, and it is not necessary to keep the tender good, or pay the money into court, as in satisfying a debt, and the wrongful refusal of the pledgee to accept payment is a conversion, and makes him liable absolutely for the pledge,[62] though he does not lose his right to collect the debt secured.[63] The pledgor's default gives the pledgee a right to consider the relationship ended, and to proceed to his remedy by sale.[64] But he may elect to retain the pledge until the debt is paid, and continue the contract in force, and ordinarily the pledgor can not prevent this,[65] though it has been held that where goods are likely to perish or depreciate greatly in value, the pledgor by a bill in equity may compel their sale.[66]

§ 64. **Termination by consent of parties or operation of law.**—The parties may terminate the relation at any time by mutual agreement. The destruction of the chattel pledged works

[59] Briggs v. Walker, 21 N. H. 72.

[60] Van Zile Bailments (2d ed.), § 293; Hale Bailments, § 36, p. 173; Goddard Bailments, § 96; Clark Contracts (1894), 629 et seq. See Merrill v. Hodgkins, 134 N. Y. S. 166.

[61] Hale Bailments, p. 173.

[62] Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, 5 Am. St. 435; Norton v. Baxter, 41 Minn. 146, 42 N. W. 865, 4 L. R. A. 305, 16 Am. St. 679; Moyer v. Leavitt, 82 Nebr. 310, 117 N. W. 698, 130 Am. St. 682. See Desgroseillers v. Anderson, 36 Que. Super. Ct. 234, 18 Am. & Eng. Ann. Cas. 718.

[63] Ball v. Stanley, 5 Yerg. (Tenn.) 199, 26 Am. Dec. 263.

[64] Van Zile Bailments (2d ed.), § 295; Goddard Bailments, § 97; Schouler Bailments (3d ed.), § 244.

[65] Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497.

[66] In the case of National Exch. Bank v. Kilpatric, 204 Mo. 119, 102 S. W. 499, 120 Am. St. 689, it was held that a bank holding stock as collateral which failed to sell it at par when ordered by the pledgor, must bear the loss when the stock becomes worthless.

by operation of law the termination of the relation,[67] but the death of one of the parties,[68] or the pledgor's bankruptcy[69] or any change in legal status has no such effect. The pledgee may, of course, at any time, by voluntarily redelivering the pledge for the purpose, terminate the pledge relationship.[70] He may voluntarily release it, take other security in its place, or release his rights. The release of the debt operates of course as a release of the pledge, but merely taking additional security or taking a new note will not terminate the pledge, unless the parties so intended.[71] A wrong of the pledgee which results in injury to the pledge, or any act of conversion terminates the pledge at the pledgor's option,[72] and so if the pledgor makes a tender of the debt secured, which the pledgee refuses to accept, the latter has lost his right to the pledge as security, but still has his right of action for the debt, though as to the pledge he is a wrongdoer, and has converted it to his own use.[73] Upon default by the pledgor, the pledgee may terminate the relationship by sale of the pledge, in a lawful manner, which will be considered in succeeding sections.[74] The mere renewal of an obligation to pay money does not release or discharge securities deposited as collateral,[75] and it is held that property pledged collaterally will be released

[67] Van Zile Bailments (2d ed.), § 328; Goddard Bailments, § 95.

[68] Warrior Coal &c. Co. v. Nat. Bank (Ala.), 53 So. 997; Hoare v. Parker, 2 T. R. 376 (unless the pledgor had only a life interest in the property).

[69] Bell v. Hanover Nat. Bank, 57 Fed. 821; Dowler v. Cushwa, 27 Md. 354; Yeatman v. Savings Inst., 95 U. S. 764, 24 L. ed. 589; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

[70] Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Collins v. Buck, 63 Maine 459; Jarvis v. Rogers, 15 Mass. 389; First Nat. Bank v. Bradshaw (Nebr.), 135 N. W. 830, 39 L. R. A. (N. S.) 886; Black v. Bogert, 65 N. Y. 601; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Fletcher v. Howard, 2 Aikens (Vt.) 115, 16 Am. Dec. 686. A pledge of property situated in a warehouse is restricted to the identical property pledged, and the pledge is lost by the subsequent substitution for it of other property of like character. Swedish-American Nat. Bank v. First Nat. Bank, 89 Minn. 98, 94 N. W. 218, 99 Am. St. 549.

[71] Goddard Bailments, § 107; Story Bailments (9th ed.), §§ 360, 365; Schouler Bailments (3d ed.), § 263. The taking of the note of a third person for the amount of an overdue note, with such note as collateral thereto, may release property held as collateral for the overdue note. Lincoln v. Nat. Met. Bank, 35 App. (D. C.) 362, 30 L. R. A. (N. S.) 1215.

[72] Whitlock v. Heard, 13 Ala. 776, 48 Am. Dec. 73. See cases cited under § 58.

[73] See cases cited under note 63.

[74] See § 66 et seq.

[75] First Nat. Bank v. Gunhus, 133 Iowa 409, 110 N. W. 611, 9 L. R. A. (N. S.) 471.

under the same circumstances that a surety who is personally bound would be.[76]

§ 65. **Redelivery.**—The pledgee is under the same duty to redeliver as any other bailee, and when the pledge is redeemed, he must return the article pledged, together with all its increase and profits.[77] He must return the identical property received,[78] except that in the case of certificates of stock he may return other certificates of precisely similar character.[79]

§ 66. **Pledgee's remedies upon pledgor's default.**—Upon default in his obligation by the pledgor, the pledgee may either sue upon the debt, in which instance he retains his lien upon the pledge until the satisfaction of the debt secured by the payment of the judgment, or exercise his power of sale of the property at common law, upon notice to the pledgor, by a proceeding in equity, under a special power given by special contract, or under a power given by statute.[80]

§ 67. **Suit on the debt.**—The holding of a pledge as security for a debt does not prevent a suit on the debt, and the pledgee may sue on the debt while retaining the pledge as security, and may hold the pledge until the judgment obtained in the suit is satisfied, for the pledge is good until the debt is satisfied,[81] and it is held that the debt is not extinguished by being merged in the judgment to such an extent as to release the pledge.[82] Even though the pledgor has tendered the amount of

[76] Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. 457, 110 S. W. 361, 17 L. R. A. (N. S.) 1122.

[77] Schouler Bailments (3d ed.), § 259; American Pig Iron Co. v. German, 126 Ala. 194, 28 So. 603, 85 Am. St. 21; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Dean v. Lawham, 7 Ore. 422.

[78] Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69; Ball v. Stanley, 5 Yerg. (Tenn.) 199, 26 Am. Dec. 263.

[79] Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282; Worthington v. Tormey, 34 Md. 182; Gruman v. Smith, 81 N. Y. 25; Gilpin v. Howell, 5 Pa. St. 41, 45 Am. Dec. 720.

[80] See §§ 67-71. Hale Bailments, p. 162, § 35; Van Zile Bailments (2d ed.), § 296; Goddard Bailments, § 98; White River Sav. Bank v. Capital Sav. Bank, 77 Vt. 123, 107 Am. St. 754; note, 73 Am. St. 566. But a statutory provision for notice and public sale, being for the benefit of the pledgor, may be waived by the pledgor. Ardmore State Bank v. Mason, 30 Okla. 568, 120 Pac. 1080.

[81] See cases cited in note 82. Skud v. Tillinghast, 195 Fed. 1; De Cordova v. Barnum, 130 N. Y. 615, 29 N. E. 1099, 27 Am. St. 538.

[82] Black v. Reno, 59 Fed. 917; Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. 347; Jones v.

the debt, and this has been refused, the pledgee still has his remedy upon the debt, though he has lost his lien upon the pledge.[83] If the pledgee in his suit upon the debt attaches the pledged property, or levies an execution upon it, he is held to have waived the lien of the pledge, since he has by the levy admitted that the property is in the possession of the pledgor subject to execution, or attachment, and thus he is estopped from setting up in himself a right to its possession.[84] The pledgor, when sued on the pledge debt, cannot set off the value of the pledge at common law[85] unless it has been converted,[86] but in several states the pledgee who sues on the debt must produce the pledge or be liable for its value, at the time of trial.[87]

§ 68. **Common-law sale of the pledge.**—Upon default by the pledgor, the pledgee may make a demand for payment, and if he fails to comply, the pledgee may then, after reasonable notice to the pledgor of the time and place of the sale, sell the property pledged at public auction.[88] Notice is necessary because the pledgor has the right to redeem at any time before the sale, and also in order that he may see that the sale is conducted fairly, and may find prospective purchasers to make the price better, and the pledgee cannot lawfully sell without giving notice,[89] unless the debtor is informed of the time and place of the

Scott, 10 Kans. 33; Smith v. Strout, 63 Maine 205; Wallace v. Finnegan, 14 Mich. 170, 90 Am. Dec. 243; note, 73 Am. St. 567; contra, American Bonding Co. v. Loeb, 50 Wash. 104, 96 Pac. 692, 126 Am. St. 891.

[83] Potts v. Plaisted, 30 Mich. 149; Norton v. Baxter, 41 Minn. 146, 42 N. W. 865, 4 L. R. A. 305 and note, 16 Am. St. 679; Kortright v. Cady, 21 N. Y. 328, 17 Am. Dec. 145; cases cited in note 63.

[84] Legg v. Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; Buck v. Ingersoll, 11 Metc. (Mass.) 226; contra, Arendale v. Morgan, 5 Sneed (Tenn.) 703.

[85] Winthrop Sav. Bank v. Jackson, 67 Maine 570, 24 Am. Rep. 56.

[86] Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Cass v. Higenbotam, 27 Hun (N. Y.) 406, revd. 100 N. Y. 248, 3 N. E. 189; Bank of British Columbia v. Marshall, 8 Sawy. (U. S.) 29, 11 Fed. 19; Bigelow & Co. v. Walker, 24 Vt. 149, 58 Am. Dec. 156.

[87] See cases cited in note preceding. Ocean Nat. Bank v. Faut, 50 N. Y. 474; Stuart v. Bigler's Assignees, 98 Pa. St. 80.

[88] Mauge v. Heringhi, 26 Cal. 577; McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. 381; Sell v. Ward, 81 Ill. App. 675; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; In re Jeane's Appeal, 116 Pa. St. 573, 11 Atl. 862, 2 Am. St. 624; Toronto Gen. Trusts Corp. v. Cent. .Ontario R. Co., 10 Ont. L. R. 347, 4 Ann Cas. 1163 and cases cited in note.

[89] McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. 381; Milliken v. Dehon, 27 N. Y. 364; In re Jeane's Appeal, 116

sale from other sources, and then notice is unnecessary,[90] since actual notice is all that the law requires. The rule is that the pledgee has not the right to purchase at his own sale, and if he does, the sale is voidable at the option of the pledgor.[91] If he avoids the sale the pledge is in the same condition as before, the pledgee still holding his lien for the debt secured.[92] The pledgee must exercise the utmost good faith in the sale, and must hold it at a reasonable time, and at a proper place.[93] As to any surplus of the proceeds of the sale of the pledged property, over the amount of the debt secured, the pledgee is a trustee for the pledgor.[94] If notice cannot be given to the pledgor because he cannot be found, a judicial sentence is necessary to a valid sale by the pledgee.[95] If the sale is legally and fairly conducted, inadequacy of price is not a ground for setting it aside.[96]

§ 69. Sale in equity.—The pledgee who has an adequate remedy at law is not entitled to go into equity, and it seems that

Pa. St. 573, 11 Atl. 862, 2 Am. St. 624. But see as to waiver by pledgor, Ardmore State Bank v. Mason, 30 Okla. 568, 120 Pac. 1080.

[90] Jones on Pledges, § 613; Alexandria L. & H. R. Co. v. Burke, 22 Grat. (Va.) 254.

[91] Hill v. Finigan, 77 Cal. 267, 19 Pac. 494, 11 Am. St. 279n; Winchester v. Joslyn, 31 Colo. 220, 72 Pac. 1079, 102 Am. St. 30; Glidden v. Mechanics Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737 and note; Thomas v. Gilbert, 55 Ore. 14, 101 Pac. 393, 104 Pac. 888; Ann. Cas. 1912A. 516 and note. See Holston Bank v. Wood (Tenn.), 140 S. W. 31, where it was held that the pledgor may not hold liable for conversion the pledgee who purchases collateral at his own sale, but who retains possession and does not refuse to return them upon tender of amount of the debt.

[92] Farmers Loan &c. Co. v. Toledo &c. R. Co., 54 Fed. 759; Stokes v. Frazier, 72 Ill. 428; Bank of Old Dominion v. Dubuque &c. R. Co., 8 Iowa 277, 74 Am. Dec. 302; Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69; Bryan v. Baldwin, 52 N. Y. 232; Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737.

[93] Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. 525; Hagan v. Nat. Bank, 182 Mo. 319, 81 S. W. 171; King v. Texas Banking & Ins. Co., 58 Tex. 669.

[94] Jones Pledges, §§ 649, 650; Taylor v. Turner, 87 Ill. 296; Miles v. Walther, 3 Mo. App. 96; Foster v. Berg & Co., 104 Pa. St. 324. Where a pledgee who foreclosed a mortgage purchased the property to prevent sacrifice, under a power given in the mortgage, but was not authorized by the pledge contract to purchase at his own sale, he holds as the trustee for the pledgor, subject to his right to redeem. Union Trust Co. v. Hasseltine, 200 Mass. 414, 86 N. E. 777, 16 Ann. Cas. 123.

[95] Indiana &c. R. Co. v. McKernan, 24 Ind. 62; Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294n; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248.

[96] Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690. Nor the fact that but one bidder attended. Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. 525.

only where there is an accounting necessary,[97] or where there are conflicting claims or intervening rights to the property,[98] or where the pledgor cannot be personally notified,[99] is the pledgee entitled to bring a bill in equity, and obtain a decree for the sale of the property.

§ 70. Sale under statute.—In most of the states the foreclosure of a pledge and its sale is regulated by statute. In some of these states any other method of sale is forbidden, in others sale at common law, or under a special power given by contract, is permitted as well as the statutory sale. It is sufficient to say here that before foreclosing any pledge, the statutes of the state where the foreclosure is sought should be examined.

§ 71. Sale under the provisions of a special contract.—The parties may agree upon the power of the pledgee to sell the pledge upon default, upon such conditions as they see fit, so long as they are not illegal, or unconscionable. Thus if permitted by contract the sale may be held privately, demand and notice may be omitted, the pledgee may purchase at the sale, or the pledgee's liability may be increased,[1] but a provision in the pledge contract that the pledgee shall become absolute owner upon default is unenforcible,[2] this being perhaps the only strict limitation upon the

[97] Durant v. Einstein, 35 How. Prac. (N. Y.) 223, 5 Rob. (N. Y.) 423; In re Conyngham's Appeal, 57 Pa. St. 474.

[98] American Pig Iron Co. v. German, 126 Ala. 194, 28 So. 603, 85 Am. St. 21; Horner v. Savings Bank, 7 Conn. 478; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497n; Boynton v. Payrow, 67 Maine 587; Cleghorn v. Minnesota Title Co., 57 Minn. 341, 59 N. W. 320, 47 Am. St. 615.

[99] See cases cited under note 95.

[1] Schouler Bailments (3d ed.), §§ 225, 249; Farmers' National Bank v. Venner, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690; Cooper v. Simpson, 41 Minn. 46, 42 N. W. 601, 4 L. R. A. 194, 16 Am. St. 667; Palmer v. Mutual L. Ins. Co., 114 Minn. 1, 130 N. W. 250. In re Jeane's Appeal, 116 Pa. St. 573, 11 Atl. 862, 2 Am. St. 624. A provision in a note secured by a pledge of collateral, giving the holder the right to make such use of the collateral as he may desire, so that he returns to the pledgor collateral of the same amount and kind, gives him no right to sell and end the pledgor's rights, before default in payments on the note. Commonwealth v. Atlhause, 207 Mass. 32, 93 N. E. 202, 31 L. R. A. (N. S.) 999n.

[2] New York L. Ins. Co. v. Curry, 115 Ky. 180, 72 S. W. 736, 103 Am. St. 297. See Darrill v. Eaton, 35 Mich. 302. It was held in Kentucky that one may not assign a paid-up insurance policy to the insurance company as collateral for a loan and give it the right to forfeit the policy, or cancel it upon default (Mutual L. Ins. Co. v. Twyman, 122 Ky. 513, 92 S. W. 335, 121 Am. St. 471) but that he may surrender it at its cash value

power of the parties to contract that the sale shall be carried out in any manner they see fit.

§ 72. **Further of pledgee's rights in case of default—Where pledge is a chose in action, or corporate stock.**—The rule is that where the pledge is divisible, the pledgee can sell no more than enough to satisfy his debt, or the sale may be avoided by the pledgor.[3] It is also the pledgee's duty to try to realize the most possible for the pledgor by the sale, and if the property would bring more divided and sold in separate parcels or lots than if sold altogether, it is his duty so to sell it.[4] Default by the pledgor of a negotiable instrument does not authorize the pledgee to sell it, in the absence of special contract, but his remedy is to hold it and collect it as it becomes due, applying the proceeds upon the pledge debt.[5] As was said in a preceding section, the pledgee of negotiable instruments is held to due diligence in collecting them, and when they become due, is entitled to maintain an action upon them, whether or not the pledge debt is due.[6] He has no right to compromise upon negotiable securities by accepting a less amount than is due, and the general rule is that if he does he is liable to the pledgor for the difference between the amount accepted and the face of the security,[7] though a compromise may be upheld in a case where the maker is insolvent, and it was for the best interest of the pledgor as well as the pledgee.[8] It has been held proper to sell stocks and bonds on the

in payment. Crice v. Illinois L. Ins. Co., 122 Ky. 572, 92 S. W. 560, 121 Am. St. 489.

[3] Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3.

[4] Hale Bailments, p. 169; Fitzgerald v. Blocher, 72 Ark. 742, 29 Am. Rep. 3; Howard v. Ames, 3 Metc. (Mass.) 308.

[5] Joliet Iron Co. v. Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 341; Wheeler v. Newbould, 16 N. Y. 392. See Moses Exr. v. Grainger, 106 Tenn. 7, 58 S. W. 1067, 53 L. R. A. 857n, and full note; also note 4 L. R. A. 587. As to recovery of full amount of note by pledgee, see Gold Glen &c. Co. v. Dennis (Colo. App.), 121 Pac. 677, and Slack v. Elkins (Ga. App.), 73 S. E. 862.

[6] See § 56, Joliet Iron &c. Co. v. Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 341; Slevin v. Morrow, 4 Ind. 425; Hazard v. Wells, 2 Abb. N. Cas. (N. Y.) 444.

[7] Zimpleman v. Veeder, 98 Ill. 613; Union Trust Co. v. Rigdon, 93 Ill. 458; Wood v. Mathews, 73 Mo. 477; Fairbanks v. Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475.

[8] Story Bailments (9th ed), § 214; Bowman v. Wood, 15 Mass. 534; Exeter Bank v. Gordon, 8 N. H. 66; Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294. And if all the collateral is insufficient to satisfy the debt, the pledgor cannot complain of a compromise made by the pledgee. Zollman v. Jackson Trust & Savings

stock exchange after the custom of brokers, rather than by special public sale.[9] Where brokers, upon the advancement of an agreed amount by their customers, called a margin, advance the remainder of the purchase-price, they are considered to hold the stocks in pledge for the amount advanced, and they may foreclose their liens according to the customs, rules and usages of brokers upon reasonable notice to the customer, and the allowance to him of reasonable time in which to pay the margins demanded.[10] Custom has brought about a certain departure from the rules of law recognized in other pledges in the case of stocks purchased on margins.

§ 73. **Pledgor's rights in case of default, or in case of pledgee's wrong.**—The pledgor has the right to redeem at any time after default until sale by the pledgee.[11] He has a right to a fair and impartial sale by the latter, and may avoid a sale which is notoriously unfair, or one where no demand for payment was made, or where he had no notice of its time and place.[12] The general rule is that he has no right to compel a sale of the pledge by the pledgee after default, even if the market should be falling, for it is said that his rights are sufficiently guarded by the privilege of redeeming, or of selling his equity of redemption.[13] He is entitled to any surplus of the proceeds

Bank, 238 Ill. 290, 87 N. E. 297, 32 L. R. A. (N. S.) 858n.

[9] Denton v. Jackson, 106 Ill. 433; Worthington v. Tormey, 34 Md. 182; Gruman v. Smith, 81 N. Y. 25.

[10] See cases cited in note 9; Van Zile Bailments (2d ed.), §§ 320-22; note 74 Am. St. 471-4. But if the broker sells the stock without notice to the customer of the time and place of the sale, it is a conversion. Content v. Banner, 184 N. Y. 121, 6 Am. & Eng. Ann. Cas. 106; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80. A broker who carries stock on a margin for a customer may pledge it for his own purposes to the extent of the amount of his advances. Clark v. Baillie, 45 Can. Sup. Ct. 50, Ann. Cas. 1912B. 548 and note.

[11] Van Zile Bailments (2d ed.), § 323; Milliken v. Dehon, 27 N. Y. 364, revg. 23 N. Y. Super. Ct. 325.

[12] Hamilton v. State Bank, 22 Iowa 306; Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. ed. 658. See cases cited in notes 89 and 90. Voluntary and unconditional surrender of the pledged property to the pledgor usually operates as a waiver or loss of the pledge. First Nat. Bank v. Bradshaw (Nebr.), 135 N. W. 830, 39 L. R. A. (N. S.) 887 and note.

[13] This applies where the pledgee of corporate stock allowed it to depreciate in value. Jones Pledges, § 606n; Lake v. Little Rock Trust Co., 77 Ark. 53, 90 S. W. 847, 3 L. R. A. (N. S.) 1199 and note, 7 Am. & Eng. Ann. Cas. 394; Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551; Taggard v. Curtenius, 15 Wend. (N. Y.) 155, but see cases cited in note 66, § 43.

of the sale of the pledge, after the pledge debt is satisfied.[14] The pledgor may waive any irregularity in the sale or other proceedings of the pledgee.[15] If the bailee has been guilty of a misuse of the property, or of some act which would terminate the lien, the pledgor has a right of action for conversion.[16]

§ 74. **Rights of purchaser at pledgee's sale.**—The general rule is that a legal sale after default by the pledgee divests the title of the pledgor, and puts in the purchaser a good and valid title to the property pledged, for the pledgee sells not only his own interest, but all the right of the pledgor, which he could have given him power to sell at the time the pledge contract was made.[17] As we have seen, the pledgee before default can assign only his own interest, subject to the rights of the pledgor under the pledge contract, and the purchaser from the pledgee before the pledgor's default gets the same right as the pledgee held.[18] And if the sale after default was not made in accordance with law, it is held that the purchaser takes the pledgee's right, and the pledgor may not recover without paying to him the debt.[19]

[14] See cases cited in note 94. White River Sav. Bank v. Capital Sav. Bank, 77 Vt. 123, 59 Atl. 197, 107 Am. St. 754; note 83 Am. St. 392.

[15] Hill v. Finigan, 77 Cal. 267, 19 Pac. 494, 11 Am. St. 279.

[16] See cases cited under § 58. Feige v. Burt, 118 Mich. 243, 74 Am. St. 390.

[17] Halliday v. Stewart County Bank, 112 Ga. 461; Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551; Potter v. Thompson, 10 R. I. 1.

[18] See cases cited under § 57.

[19] Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. 58; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

CHAPTER IV.

CONTRACTS OF HIRING.

§ 75. Contracts of hiring.
76. Contracts of hiring the use of a thing.
77. Creation of the relation.
78. Bailor's duties and rights—Warranty of title and disclosure of defects.
79. Bailee's right to possession and use.
80. Care demanded of hirer—Expenses.
81. Bailee's misuse and conversion.
82. Third persons and subusers.
§ 83. Assignability of bailee's rights.
84. Special classes of hiring the use of a thing—Property for exhibition.
85. Special classes—Storekeeper or bath-house keeper as hired bailee of personal belongings of customer or patron.
86. Termination of the contract of hiring—Redelivery and recompense.

§ 75. Contracts of hiring.—In our general classification of contracts of hiring as one of the kinds of bailments for mutual benefit, four subclasses were recognized; namely, the hiring of the use of a thing; the hiring of services about a thing; the hiring of the custody of a thing; and the hiring of the carriage of a thing. The general principles of bailments apply fully to such contracts, and the distinguishing feature is that the bailment is for mutual benefit, and the bailee is held only to ordinary care of the article bailed. This statement must be qualified, however, as to the liability of common carriers and innkeepers, whose bailment is a bailment of hiring, and of mutual benefit, and who are yet, for reasons of public policy, held to a more than ordinary degree of care for the thing bailed. Their obligations will be treated separately. The other contracts of hiring afford perhaps the best example of the pure bailment, and the most of the examples cited to illustrate the general principles of the law of bailments were taken from contracts of hiring. Bailments for hire as a rule rest upon contract, but there are a few quasi bailments for hire, which arise by operation of law, as where property comes into the possession of captors, revenue officers, prize agents, officers of courts, or salvors, all of whom are considered depositaries for

hire.[1] Contracts of hiring are the locatio-conductio bailments of the civil law, and a letting of a thing by one party, and a hiring of it by the other, are elements present in all bailments of this class.

§ 76. **Contracts of hiring the use of a thing.**—The letting for a recompense of a chattel to be used by the hirer is the locatio rei of the Roman law. Any chattel which will not be consumed in the use may be hired. The compensation for the hiring is made to the bailee, and, though usually money, may be goods, services or any benefit, and in some cases the benefit is very indirect. The legal presumption is that the use of another's chattel is for some reward to be returned to him.[2] The locatio rei bailment differs from the commodate only in the element of compensation to the bailee, who thus becomes a letter instead of a lender, and in regard to many of the rights of the parties, especially as to conversion by the bailee, the rules are substantially the same. Common instances of this class of bailments are the hiring of a horse by a teamster or farmer, the hiring of a horse and carriage from a livery stable, or the hiring of a piece of machinery. It is held that one who leases moving-picture films for use is a bailee and bound to use only ordinary care for their preservation.[3] Exceptional instances of this class of bailment are the receiving of property for exhibition, which is held to be a bailment for hire, and the care of the effects of the customers of clothing merchants, as an incident of a business conducted for profit.[4]

[1] Captors, Story Bailments (9th ed.), § 614; The Betsey, 1 W. Rob. Adm. 93; The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428; The George, 1 Mason (U. S.) 24; revenue officers, Burke v. Trevitt, 1 Mason (U. S.) 96; prize agents, Story Bailments (9th ed.), § 619; The Rendsberg, 6 C. Rob. Adm. 142; officers of courts, Story Bailments (9th ed.), §§ 124–135, 620, 621; Burke v. Kimball, 106 Mass. 115; Trotter v. White, 26 Miss. 88; Cross v. Brown, 41 N. H. 283; Browning v. Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369; Burke v. Trevitt, 1 Mason (U. S.) 96, Fed. Cas. No. 2163; salvors, Story Bailments (9th ed.), § 622; Schiller, Cargo Ex., 2 Prob. Div. 145; Schouler Bailments (3d ed.), § 94.

[2] Goddard Bailments, § 112. Where one delivered a horse to another, who was to break her to work, and pay no compensation for her services, the court held that the bailment was one of hire, the bailor's compensation for the use of the horse being the benefit of having the horse broken, and the bailee receiving the benefit of the use of the horse. Francis v. Shrader, 67 Ill. 272.

[3] Miller v. Miloslowsky (Iowa), 133 N. W. 357.

[4] See §§ 84, 85, infra.

§ 77. Creation of the relation.—This relation is one of contract, arising from an express or implied contract, and of course the general rules of contracts apply as to the sufficiency of the consideration, the capacity of the parties, and the avoidance of a contract entered into through fraud or duress. Since the contract is of mutual benefit, either party may compel the other to perform his part, or respond in damages. The contract is merely executory until delivery by the bailor to the bailee and acceptance by the latter, when the bailment relationship commences.[5] Ordinarily, the rights of the parties are determined by the contract entered into, for any express contract, not contrary to public policy or law, will be enforced, and the parties may agree to any limitations within these restrictions as to the time, place and manner of the use of the chattel, and the bailee may contract to insure its safe return.[6]

§ 78. Bailor's duties and rights—Warranty of title, and disclosure of defects.—The bailor is a warrantor that he has such a possessory right to the chattel let as to enable the bailee to carry out the purposes of the bailment.[7] Within this qualification it is not necessary that he should be the owner or have absolute title, but if the bailee is prevented from carrying out the purposes of the contract, and is deprived of the contemplated use of the thing because of the intervention of a title superior to the bailor's, he may bring an action for the loss caused by such failure of title.[8] The bailor warrants that, so far as he knows, or in the exercise of ordinary care could know, the chattel is fit for the purpose of the bailment, and that its use for such purposes will not be dangerous, if ordinary care is exercised. He must notify the bailee of defects in the article bailed, but is not liable for in-

[5] Van Zile Bailments (2d ed.), § 120. In an interesting case recently decided, it was held that the livery stable keeper who contracted to furnish a carriage and team to carry a wedding party from the bridegroom's residence to the church, and who failed to appear at the time, was liable in breach of contract for the annoyance, inconvenience, mental harassment and mental pain caused by his failure to perform his part of the contract. Browning v. Fies (Ala.), 58 So. 931.

[6] See Hale Bailments (1896), § 41, p. 185.

[7] Schouler Bailments (3d ed.), § 151; Story Bailments (9th ed.), §§ 383, 387; Van Zile Bailments (2d ed.), § 121; Hale Bailments, p. 199; Goddard Bailments, § 113.

[8] See citations in note 7.

juries caused by defects of which he did not know, and could not know in the exercise of reasonable diligence,[9] and is only liable for negligence. So if the defect is latent, and could not have been discovered by careful examination, the bailor cannot be held,[10] and if the bailee had actual notice of the defect, the bailor is not liable for his injuries obtained after such notice.[11] The degree of diligence to be exercised depends upon the circumstances, and where the use contemplated might endanger the safety or life of others, the letter is held to a high degree of diligence, and the most watchful care, as in the case of livery stable keepers, who make a business of letting horses and carriages. So, "a liveryman is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring,"[12] and if a liveryman lets a horse which he knows, or in the exercise of reasonable care could have known, to be dangerous and unsuitable for the service for which it is required, he is liable for injuries caused by its vicious propensities.[13]

§ 79. **Bailee's right to possession and use.**—As in all bailments, the bailee has the right of possession pending the accomplishment of the bailment purpose. Since in this case that purpose is the use of the chattel bailed, the bailee has the right to the exclusive use and control of the thing for the purpose for which it was hired, as against all the world, including the letter,[14]

[9] Higman v. Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. 33; Leach v. French, 69 Maine 389, 31 Am. Rep. 296; Moriarty v. Porter, 22 Misc. (N. Y.) 536, 49 N. Y. S. 1107; Harrington v. Snyder, 3 Barb. (N. Y.) 380; Kissam v. Jones, 56 Hun (N. Y.) 432, 31 N. Y. St. 198, 10 N. Y. S. 94. See cases cited in notes 10, 11, 12, 13. Baker & Lockwood Mfg. Co. v. Clayton, 40 Tex. Civ. App. 586, 90 S. W. 519.

[10] Van Zile Bailments (2d ed.), § 123; Horne v. Meakin, 115 Mass. 326; Hadley v. Cross, 34 Vt. 586, 80 Am. Dec. 699.

[11] Cutter v. Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; Goddard Bailments, § 113.

[12] Conn v. Hunsberger, 224 Pa. 154, 73 Atl. 324, 25 L. R. A. (N. S.) 372, 132 Am. St. 770. See Payne v. Halstead, 44 Ill. App. 97; Nisbet v. Wells, 25 Ky. L. 511, 76 S. W. 120; Lynch v. Richardson, 163 Mass. 160, 39 N. E. 801, 47 Am. St. 444; Copeland v. Draper, 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283, 34 Am. St. 314; McGregor v. Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. 919; Huntoon v. Trumbull, 12 Fed. 844, 2 McCrary (U. S.) 314.

[13] See cases cited in note 12.

[14] Story Bailments (9th ed.), § 395; Van Zile Bailments (2d ed.), § 122; Goddard Bailments, § 115; McConnell v. Maxwell, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428; Banfield v. Whipple, 10 Allen (Mass.) 27, 87 Am. Dec. 618; Woodman v. Hub-

or an attaching creditor of the letter,[15] and this right is not lost by redelivery to the owner for a temporary purpose.[16] The bailee's right to use extends only to the purpose for which it was hired, and not to any other. The extent of his right is consequently mainly dependent upon the agreement between the parties, and he is held to good faith in carrying out this agreement.

§ 80. Care demanded of hirer—Expenses.—The bailee is held to ordinary diligence in the care of the chattel, and lack of such diligence will be negligence for which he is liable.[17] What is ordinary diligence depends of course upon the character of the thing and the circumstances. The majority of the cases brought upon contracts for the hiring of the use of a thing are those in which a horse has been hired, and this subject affords the best illustration of the care to which the bailee is held. It was said by Mr. Schouler,[18] "Unless the bailee took the animal for too short a time, or under a special arrangement whereby the bailor was to look after his own property, he ought to provide the creature regularly with proper food and drink,[19] afford due shelter and repose, and, in general, take reasonable heed that the animal, while resting, is so fastened up that it may not readily run away or be stolen.[20] While putting the horse to active use he should not harness carelessly, overload,[21] overdrive,[22] be heedless of

bard, 25 N. H. 67, 57 Am. Dec. 310; Beach v. Raritan &c. R. Co., 37 N. Y. 457; Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435; Hickok v. Buck, 22 Vt. 149.

[15] Hartford v. Jackson, 11 N. H. 145; Smith v. Niles, 20 Vt. 315, 49 Am. Dec. 782.

[16] Roberts v. Wyatt, 2 Taunt. 268.

[17] Story Bailments (9th ed.), §§ 398, 399; Schouler Bailments (3d ed.), § 134; Higman v. Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. 33; Bradley v. Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679; Evans v. Nail, 1 Ga. App. 42, 57 S. E. 1020; Union Stock Yards & Transit Co. v. Mallory &c. Co., 157 Ill. 554, 41 N. E. 888; Duffy v. Howard, 77 Ind. 182; Chamberlin v. Cobb, 32 Iowa 161; Taussig v. Schields, 26 Mo. App. 318; Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875; Collins v. Bennett, 46 N. Y. 490; Millon v. Salisbury, 13 Johns. (N. Y.) 211; Clark v. United States, 95 U. S. 539, 24 L. ed. 518, 13 Ct. Cl. (U. S.) 519; Gleason v. Beers' Estate, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757; Baker & Lockwood Mfg. Co. v. Clayton, 46 Tex. Civ. App. 384, 103 S. W. 197.

[18] Schouler Bailments Including Carriers (1905), § 112.

[19] Handford v. Palmer, 2 Brod. & Bing. 359; Eastman v. Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677.

[20] Jackson v. Robinson, 18 B. Mon. (Ky.) 1.

[21] Harrington v. Snyder, 3 Barb. (N. Y.) 380; McNeill v. Brooks, 1 Yerg. (Tenn.) 773.

[22] Overdriving and overheating, Edwards v. Carr, 13 Gray (Mass.)

what he perceives to be the creature's frailties, nor fail to supply, prudently, wants essential to its health and good condition. If disease or bruise be discovered during the bailee's term, he should be discreet in its treatment, and in extremity call in some farrier or expert;[23] or else, informing his bailor promptly, throw the responsibility, as he may generally do, upon the owner. He should not take dangerous risks of travel.[24] During his whole term of use the bailee ought to act honorably, humanely, and with such reasonable regard for preserving the animal's value unimpaired as from prudent men might be expected." So when the bailee has fairly followed the terms of his engagement, and has used proper diligence, the bailor must bear all loss occasioned to the animal in the course of its use.[25] And if he is ordinarily prudent and careful, the bailee is not liable for injuries caused by the horse's nervous or vicious nature.[26] If the letter knows that the hirer is physically or mentally incapable of giving proper care, as a young child, or an imbecile or cripple, he cannot hold him to the same degree of care as a normal person.[27] But since in this class of cases, personal use by the hirer is not always contemplated, it is held that the bailor may rely upon the bailee's pecuniary responsibility to make good any injury which might occur.[28] A hirer who knows that the thing hired is liable to deterioration or injury must exercise commensurate diligence.[29] Inevitable accident or superior force excuses the bailee from liability for loss,[30] or natural deterioration or wear and tear incident

234; Buis v. Cook, 60 Mo. 391; Wentworth v. McDuffie, 48 N. H. 302; Rowland v. Jones, 73 N. Car. 52; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519.

[23] Story Bailments (9th ed.), § 405; Bray v. Mayne, 1 Gow. 1; Deane v. Keate, 3 Camp. 4; Vaughan v. Webster, 5 Harr. (Del.) 256; Thompson v. Harlow, 31 Ga. 348; Graves v. Moses, 13 Minn. 335.

[24] Such as trying to ford a swollen stream. United Tel. Co. v. Cleveland, 44 Kans. 167.

[25] Francis v. Shrader, 67 Ill. 272; Buis v. Cook, 60 Mo. 391; Harrington v. Snyder, 3 Barb. (N. Y.) 380; Carrier v. Dorrance, 19 S. Car. 30.

[26] Armstrong v. Chicago, M. & St. P. R. Co., 45 Minn. 85, 47 N. W. 459; Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091.

[27] Schouler Bailments (3d ed.), § 138.

[28] Schouler Bailments (3d ed.), § 138; Mooers v. Larry, 15 Gray (Mass.) 451.

[29] Beale v. South Devon R. Co., 12 W. R. 1115; Wilson v. Brett, 11 M. & W. 113.

[30] Watkins v. Roberts, 28 Ind. 167; Field v. Brackett, 56 Maine 121; McEvers v. The Sangamon, 22 Mo. 187; Hyland v. Paul, 33 Barb. (N. Y.) 241; Reeves v. The Constitution, Gilp. (U. S.) 579, Fed Cas. 11659.

to the use of the thing,[31] the sickness and death, or the escape, of a hired animal,[32] or loss by robbery or theft,[33] unless the bailee's negligence has exposed the property to injury, or contributed thereto.[34]

It seems that the proper rule in regard to expenses is that the bailee is liable for the ordinary and incidental expenses of caring for the property,[35] such as providing suitable food for horses,[36] and that the bailor is liable for unforeseen extraordinary expense incurred in preserving the property from loss from unexpected causes for which the hirer was not at fault, or which permanently enhance its value.[37] Under the civil law the letter must put the chattel in proper condition for use, and keep it so, but the text-writers do not consider this the rule at common law.[38]

§ 81. Bailee's misuse and conversion.—If the bailee in any way uses the property for any other purpose than that permitted by the contract of bailment, he is, of course, liable in breach of contract for any damages thus caused. But the early cases hold that any intentional deviation in use from the agreed purpose is a conversion, and that the bailee thenceforward becomes absolutely liable for any loss or injury to the property. This rule has been frequently applied in cases where a horse was killed or injured when driven or ridden to a place not provided for in the contract of hire,[39] and the bailee held liable for con-

[31] Francis v. Shrader, 67 Ill. 272; Buis v. Cook, 60 Mo. 391; Millon v. Salisbury, 13 Johns (N. Y.) 211; Harrington v. Snyder, 3 Barb. (N. Y.) 380; Reeves v. The Constitution, Gilp. (U. S.) 579, Fed. Cas. No. 11659.

[32] Watkins v. Roberts, 28 Ind. 167. But the hirer of a horse which dies from a disease contracted while at the work for which it was hired and while under his exclusive protection has the burden of proving that such death was not caused by his negligence. Selesky v. Vollmer, 107 App. Div. (N. Y.) 300, 95 N. Y. S. 130.

[33] Story Bailments (9th ed.), § 412; Campbell v. Klein, 101 N. Y. S. 577.

[34] Schouler Bailments (3d ed.), § 134; Eastman v. Sanborn, 3 Allen (Mass.) 594; Edwards v. Carr, 13 Gray (Mass.) 234; Buis v. Cook, 60 Mo. 391; Wentworth v. McDuffie, 48 N. H. 402. The bailee of a horse and wagon for hire is liable for the value if they were stolen and he did not use reasonable care to keep watch over the property. Kleiner v. Cohn, 132 N. Y. S. 779.

[35] Schouler Bailments (3d ed.), § 152; Hale Bailments, p. 201.

[36] Handford v. Palmer, 2 Brod. & Bing. 359, 5 Moore 74.

[37] Schouler Bailments (3d ed.), § 152; Story Bailments (9th ed.), § 392; Reading v. Menham, 1 Moo. & Rob. 234; Leach v. French, 69 Maine 389, 31 Am. Rep. 296; Harrington v. Snyder, 3 Barb. (N. Y.) 380; Jones v. Morgan, 90 N. Y. 4, 43 Am. Rep. 131.

[38] Schouler Bailments (3d ed.), § 152; Hale Bailments, p. 201.

[39] Malone v. Robinson, 77 Ga. 719;

version if he rides or drives a horse beyond the agreed place, or farther than the agreed distance,[40] or keeps him longer than the agreed time,[41] or hires him for one purpose or to do one kind of work, and uses him to do another kind of work.[42] The tendency of the later cases and text-writers has been to relax the rule somewhat, Judge Story suggesting that the bailee should not be held liable for conversion if the violation of duty or of contract did not conduce to the loss, and following this line, it has been held that merely taking slaves to work in another county from that specified is not ipso facto a conversion where the loss was not occasioned by such act, and there was no intention to do anything inconsistent with the owner's right,[43] and that merely driving a team beyond the agreed place, without more, is not a conversion.[44] Other cases have held that where the injury was not received while the horse was being used without the limits of the hiring, and was not caused by such use, there is no conversion.[45]

The true test of a conversion is "in an illegal control of the thing converted, inconsistent with the plaintiff's right of property."[46] And as Mr. Schouler says, "The leaven of common sense, which keeps our law in constant ferment, is here at

Homer v. Thwing, 3 Pick. (Mass.) 492; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Martin v. Cuthbertson, 64 N. Car. 328; Broussard v. Sells-Floto Show Co. (Tex. Civ. App.), 128 S. W. 439. See Palmer v. Mayo, 80 Conn. 353, 68 Atl. 369, 125 Am. St. 123, 15 L. R. A. (N. S.) 428, 12 Am. & Eng. Ann. Cas. 691.

[40] Welch v. Mohr, 93 Cal. 371; Murphy v. Kaufman, 20 La. Ann. 559; Morton v. Gloster, 46 Maine 520; Perham v. Coney, 117 Mass. 102; Fisher v. Kyle, 27 Mich. 454; Disbrow v. Tenbroeck, 4 E. D. Smith (N. Y.) 397. See Carney v. Rease, 60 W. Va. 676, 55 S. E. 729.

[41] Stewart v. Davis, 31 Ark. 518; Whalen v. New York &c. Electric Co., 63 App. Div. (N. Y.) 615, 71 N. Y. S. 593; Martin v. Cuthbertson, 64 N. Car. 328.

[42] Cartlidge v. Sloan, 124 Ala. 596, 26 So. 918; Ledbetter v. Thomas, 130 Ala. 299, 30 So. 342; Fox v. Young, 22 Mo. App. 386; Kellar v. Garth, 45 Mo. App. 332; DeVoin v. Michigan Lumber Co., 64 Wis. 616, 25 N. W. 552, 54 Am. Rep. 649. One who hires horses to draw castings along a public road does not convert a team by unhitching it from the wagon in which it is working, and hitching it to one of his own which is stalled on the road, to assist in getting it out. Weller v. Camp, 169 Ala. 275, 52 So. 929, 28 L. R. A. (N. S.) 1106n.

[43] Harvey v. Epes, 12 Grat. (Va.) 153.

[44] Doolittle v. Shaw, 92 Iowa 348, 60 N. W. 621, 26 L. R. A. 366 and note, 54 Am. St. 562; Carney v. Rease, 60 W. Va. 676, 55 S. E. 729.

[45] Farkas v. Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397; Rankin v. Shephardson, 89 Ill. 445; Lovejoy v. Jones, 30 N. H. 164; Johnson v. Miller, 16 Ohio 431.

[46] Woodman v. Hubbard, 25 N. H. 67.

work, recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability. One hires a horse for a given journey, but unexpectedly encounters a friend, and turns off to visit him, using, all the while, a prudent care of the animal; or he finds obstructions in the road, and changes the point of destination to another which must have equally suited his bailor, or he misses his way. Such instances are matters of every-day occurrence. And how few who hire a carriage and drive carefully believe themselves tied down to a literal performance, irrespective of all emergencies which may possibly occur too far off for consulting the bailor. How few imagine that, for a little longer or a little different ride, they incur an extra risk, beyond that of paying, possibly, an extra hire. * * * [A serviceable defense] lies in a just and reasonable interpretation of the bailment undertaking itself, which, if pursued with ordinary prudence, under all the circumstances, ought not to be too literally construed against a bailee who may have found himself in some unforeseen emergency, and, while far from the bailor, obliged to act upon his own judgment. For one who hires may be presumed to have much latitude, as to time and methods of enjoyment; and local usage and the good sense of the contract should interpret favorably, where restrictive use was not clearly specified. If hiring be general, any prudent use of the thing is permissible; and even if it be particular, terms not fairly meant for exclusion need not warp the hirer's discretion, if he is prepared to pay a reasonable compensation according to his use; and more especially so where an exigency happens which calls for the exercise of a discretion on his part without consulting the bailor."[47] The foundation of the liability in cases where the bailee is held guilty of a conversion is rather in tort than in contract, therefore it is no defense to the bailee that the contract of hiring is void because made on Sunday,[48] or voidable because the bailee is an infant.[49] The de-

[47] Schouler Bailments (3d ed.), §§ 140-141; Weller v. Camp, 169 Ala. 275, 52 So. 929, 28 L. R. A. (N. S.) 1106n.

[48] See Frost v. Plumb, 40 Conn. 111, 16 Am. Rep. 18; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30.

[49] Homer v. Thwing, 3 Pick. (Mass.) 492; Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340; Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519.

struction of personal property under hire by the bailee amounts to a conversion.[50]

§ 82. **Third persons and subusers.**—The bailee, since he holds a special property in the thing hired, may bring an action against any person who injures it or interferes tortiously with his possession, during the time his right exists.[51] The bailor, having the general property, is not bound to look to the bailee alone, but has the same right as the bailee to bring an action against a third party,[52] with the exception that if the hiring is for a term specified, the letter may not bring trover or replevin until the expiration of the term,[53] but may sue for an injury to the reversion.[54] The negligence of a bailee for hire is not imputable to the bailor in an action by the bailor against a third person for an injury to the property, and he may recover from a third person whose negligent or wrongful act caused the destruction or injury of the bailment, even though the bailee's negligence was contributory to the loss.[55] In this latter instance, the bailor may have a right of action when the bailee would have none. The converse of this proposition is true, that the bailor is not liable to third persons for the negligence of the bailee, his servants or agents.[56] The bailee is liable to the bailor not only for

[50] Kiskadden v. United States, 44 Ct. Cl. (U. S.) 205.

[51] Croft v. Alison, 4 Barn. & Ald. 590; McGill v. Monette, 37 Ala. 49; Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45; Rindge v. Inhabitants of Coleraine, 11 Gray (Mass.) 157; Bliss v. Schaub, 48 Barb. (N. Y.) 339; Hopper v. Miller, 76 N. Car. 402.

[52] Gordon v. Harper, 7 T. R. 9; Pain v. Whittaker, Ryan & M. 99; New York, L. E. & W. R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 338, 38 Atl. 828, affd. 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849.

[53] Clarke v. Poozer, 2 McMul. (S. Car.) 434; Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197.

[54] Schouler Bailments (3d ed.), § 154; Howard v. Farr, 18 N. H. 457; White v. Griffin, 4 Jones (N. Car.) 139.

[55] Currie v. Consolidated R. Co., 81 Conn. 383, 71 Atl. 356; Sea Ins. Co. v. Vicksburg &c. R. Co., 159 Fed. 676, 86 C. C. A. 544, 17 L. R. A. (N. S.) 925; Welty v. Indianapolis & V. R. Co., 105 Ind. 55, 4 N. E. 410; Kellar v. Shippee, 45 Ill. App. 377; Illinois Cent. R. Co. v. Sims, 77 Miss. 325, 27 So. 527, 49 L. R. A. 322; New Jersey Electric R. Co. v. New York L. E. & W. R. Co., 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849; Puterbaugh v. Reasor, 9 Ohio St. 484; Gibson v. Bessemer &c. R. Co., 226 Pa. St. 198, 75 Atl. 194, 18 Am. & Eng. Ann. Cas. 535.

[56] Claypool v. McAllister, 20 Ill. 504; Sproul v. Hemmingway, 14 Pick. (Mass.) 1, 25 Am. Dec. 350n; Hofer v. Hodge, 52 Mich. 372, 18 N. W. 112, 50 Am. Rep. 256; Carter v. Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 574; Schular v. Hudson River R. Co., 38 Barb. (N. Y.) 653.

his own negligence or default, but for the default or negligence of his servants or children in regard to the thing hired.[57] The reason is that there is no privity between the bailor and those to whom the bailee permits the enjoyment of the property, therefore the bailor must look to the bailee. The rule was applied where a servant of the hirer rode a horse to death, or left a stable door open and allowed it to escape,[58] where the servants, guests, children and boarders of the hirer defaced the furniture in ready-furnished lodgings,[59] or is applicable generally in any instance where subagents employed by the hirer negligently injure the property.[60] The liability rests, however, rather on the principle of agency than that of master and servant. It seems that the better rule is that the master is liable, not merely for the acts of the servant within the scope of his authority, but also for those which are within the course of his employment, even though the particular act may be unauthorized.[61] But where one let a brougham and a coachman to drive it, the owner of the brougham was not liable for a theft of the traveler's goods, which were silversmith's samples, committed by the coachman, for such an act was without the course of his employment.[62] The bailee's liability rests upon the ground that he acts through instrumentalities when he acts through servants, guests, children or subagents, and that one who sets in motion an instrumentality animate or inanimate, rational or irrational, which injures another is liable.[63] Necessarily, the bailee is liable to third persons under the ordinary rules applying to agents and servants, and the bailor who sends a servant

[57] Story Bailments (9th ed.), § 401; 2 Kent Comm. (4th ed.), 586, 587; Hale Bailments, p. 204 et seq.; Schouler Bailments (3d ed.), §§ 145, 146.

[58] Jones Bailments, 89; 1 Black. Comm. 430, 431; Coggs v. Bernard, 2 Ld. Raym. 909; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

[59] Jones Bailments, 89; Story Bailments (9th ed.), § 400; Schouler Bailments (3d ed.), §§ 145, 146; Smith v. Bouker, 49 Fed. 954, 1 C. C. A. 481.

[60] Schouler Bailments (3d ed.), §§ 145, 146; Story Bailments (9th ed.), § 401; Randleson v. Murray, 3 Nev. & P. 239, 8 Adol. & E. 109; Bush v. Steinman, 1 Bos. & P. 409; Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743; Hall v. Warner, 60 Barb. (N. Y.) 198; Mims v. Mitchell, 1 Tex. 443.

[61] Note, Jag. Torts, 239–280; Hale Bailments, p. 207; Mallach v. Ridley, 47 Hun (N. Y.) 638, 24 Abb. N. Cas. (N. Y.) 172, 181, 15 N. Y. St. 4, 9 N. Y. S. 922.

[62] Cheshire v. Bailey (1905), 1 K. B. 237, 1 Am. & Eng. Ann. Cas. 94 and note.

[63] Hale Bailments, p. 208, citing Innes, Torts; Schouler Bailments (3d ed,), § 146.

to care for the thing hired is liable for the acts of such servant not outside of the course of his employment.[64] If two persons jointly hire a thing for use, either is liable for the negligence or misconduct of the other resulting in its injury.[65]

§ 83. **Assignability of bailee's rights.**—The bailee at will, where either party may at his pleasure terminate the bailment, and the bailee in whom the bailment is a personal trust, have no assignable interest in the chattel whose use is bailed to them for hire, and any assignment by them passes no interest, but instead terminates the bailment, authorizing the owner to bring an action in trover or conversion.[66] But in certain circumstances where there is no personal confidence it would be entirely in accord with the purpose of the bailment that the hirer should assign his interest, as where property is leased for a number of years with the use of the furniture or of farm implements and stock, in which case the lessee, unless forbidden by his contract, may sublet, and assign his right to the use of the chattels.[67]

§ 84. **Special classes of hiring the use of a thing—Property for exhibition.**—Where a general or special invitation is given to persons to deliver articles to a corporation or association or another person for the purpose of exhibition in public, to be redelivered after the exhibition, the bailment is one of hire, since both parties receive a benefit, and the invitation and the placing of the articles in the care of the exhibitor form a sufficient consideration, so that the bailee is held to ordinary care.[68]

[64] See notes 61 and 62.

[65] Davey v. Chamberlain, 4 Esp. 229; O'Brien v. Bound, 2 Speers (S. Car.) 495, 42 Am. Dec. 384. Where one hires a horse and the other rides as a passenger or friend, and takes no part in the control, the hirer only is responsible (Dyer v. Erie R. Co., 71 N. Y. 228), but if the other abets, both are liable. Banfield v. Whipple, 10 Allen (Mass.) 27, 87 Am. Dec. 618.

[66] Russell v. Favier, 18 La. 585, 36 Am. Dec. 662; Crocker v. Gullifer, 44 Maine 491, 69 Am. Dec. 118; Bailey v. Colby, 34 N. H. 29, 66 Am. Dec. 752.

[67] Day v. Bassett, 102 Mass. 445; Vincent v. Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683; Bailey v. Colby, 34 N. H. 29.

[68] Prince v. Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Vigo Agricultural Society v. Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657. And see Smith v. Minneapolis Library Board, 58 Minn. 108, 59 N. W. 979.

§ 85. Special classes—Storekeeper or bath-house keeper as hired bailee of personal belongings of customer or patron. —A bailment is for hire, even though no direct hire is paid for the bailment, where it is a necessary incident of a business in which the bailee makes a profit.[69] This rule was applied where the proprietor of a bath-house invited its patrons, when they purchased tickets entitling them to a bath, to place their valuables in a box, the key to which was given to the patron, and while a patron was bathing, the key was taken by a trespasser from the pocket of his clothing hanging in the dressing room, and turned in to the attendant, who delivered a gold watch and money to the holder of the key, and it was held that the proprietor was liable for the loss of the goods, which had been caused by want of ordinary care for their preservation.[70] The same rule is applied where one who goes into a retail clothing store to purchase clothing is invited by a salesman to place his valuables in a certain place, or to lay his clothing in a certain place, while trying on garments, and it is necessary and usual for certain articles of clothing to be removed when trying on others, or for an article such as a watch to be removed from the person, and through want of ordinary care on the part of the proprietor of the store or his clerk, the articles of clothing or valuables laid aside, or valuables contained in the pockets of these articles, are taken, the proprietor is held liable for the loss.[71] But where a customer, knowing that the clerks are busy, proceeds to wait on himself, and without express or implied invitation lays aside his coat and vest to try on garments, knowing that no clerk is there to watch them, and the garments are stolen when there is no one but himself to watch them, he can not hold the proprietor of the store liable.[72] This might perhaps be considered as the hiring of

[69] See cases cited in notes 70 and 71.

[70] Tombler v. Keolling, 60 Ark. 62, 28 S. W. 795, 27 L. R. A. 502, 46 Am. St. 146; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 8 Am. & Eng. Ann. Cas. 89, 6 L. R. A. (N. S.) 828, 115 Am. St. 114; Sulpho-Saline Bath Co. v. Allen, 66 Nebr. 295, 92 N. W. 354, 1 Am. & Eng. Ann. Cas. 21; Levy v. Appleby, 1 City Ct. (N. Y.) 252.

[71] Delmour v. Forsythe, 128 N. Y. S. 649; Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. 519, rehearing denied, 26 N. E. 758; Woodruff v. Painter, 150 Pa. St. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. 786.

[72] Wamser v. Browning, King & Co., 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314n.

the custody of an article by the bailor, yet upon reflection it is seen that the bailment may be said to be primarily for the benefit of the merchant or bath-house keeper, who has impliedly invited the bailee to enter his establishment, and in order to make his place of business more attractive, has assumed the care of his belongings. A railroad company which maintains a parcel room where it receives and checks property for safekeeping to be redelivered at such room, for which services it makes a nominal charge, is a bailee for hire as to the goods checked, and not a gratuitous bailee, the transaction being one of mutual benefit, and the railroad company must take ordinary care of the property, and is liable for ordinary negligence.[73]

§ 86. Termination of the contract of hiring—Redelivery and recompense.—The general principles in regard to the termination of a bailment, as heretofore discussed, apply. The bailee's conversion of the articles bailed puts an end to the relation and makes him absolutely liable. Destruction of the chattel before the completion of the bailment purpose also terminates the bailment. The bailee's duties upon the fulfilment of the use for which the thing was hired are to redeliver it to the letter, and to make to him recompense for its use, if this has not been done before.[74] His duties as to both of these may be very much dependent upon the contract agreement. In general the thing is to be restored in as good condition as when received, with the exception of losses caused by ordinary wear and tear, losses caused by inevitable accident or superior power, and losses which have occurred without culpable negligence or misconduct on the bailee's part.[75] However, though a bailee in a contract of hiring is by law held only to a reasonable care, he may enter into such a contract so that he will become the insurer of the safety of the prop-

[73] Fraam v. Grand Rapids &c. R. Co., 161 Mich. 556, 126 N. W. 851, 29 L. R. A. (N. S.) 834, and note, 21 Ann. Cas. 96, and note. See also, holding a railroad company liable as a warehouseman in such a case, Terry v. Southern R. Co., 81 S. Car. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295n; Hofford v. New York Cent. &c. R. Co., 43 Pa. Super. Ct. 303.

[74] Schouler Bailments (3d ed.), §§ 158–160; Hale Bailments, pp. 209, 210; Goddard Bailments, § 124.

[75] See § 81; Schouler Bailments (3d ed.), § 159. As to redelivery affected by contract, see Walker v. Bement (Ind. App.), 94 N. E. 339; Colorado &c. Tramway Co. v. Montgomery Mach. Co., 49 Colo. 132, 111 Pac. 848.

erty bailed while in his possession, and the law will enforce such contract, even if loss is caused by inevitable accident. So where the contract is to return the bailment in good condition or pay its value, it is held that the contract is absolute, and that the bailee is liable as an insurer.[76] The bailee for hire of a horse who contracts expressly to return the horse in good condition or to pay its value is an insurer, and if the horse dies while in the bailee's possession without his fault he is liable for its value, and in an action on such contract it is not necessary to allege or prove negligence on the part of the bailee, but it is sufficient to prove the contract and the bailee's refusal to comply therewith on demand.[77] The hirer must return to the letter personally, or his empowered agent, personal representative or transferee, as the circumstances may be.[78] He must return at the proper time, which may be either at the termination of the purpose of the bailment, or upon the bailor's rightful demand.[79] A failure to return would con-

[76] Grady v. Schweinler, 16 N. Dak. 452, 113 N. W. 1031, 15 Am. & Eng. Ann. Cas. 161, and note. In the following cases the bailee was held liable for a loss not caused by his negligence: Pope v. Farmers' Union &c. Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. 87 (contract to deliver bailment, damage by elements excepted, bailee liable for damage by fire); Archer v. Walker, 38 Ind. 472 (contract that bonds were to be returned or accounted for); Federal Chemical Co. v. Green, 33 Ky. L. 671, 110 S. W. 859 (contract to store fertilizers and be responsible for their loss from any cause); Reinstein v. Watts, 84 Maine 139, 24 Atl. 719 (contract to hold goods at risk of bailee); Drake v. White, 117 Mass. 10 (contract to deliver bailment or equivalent in money); National Cash Register Co. v. Caillias, 84 N. Y. S. 116 (contract for the safe custody of a bailment and for its safe and peaceable return); Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co., 37 Misc. (N. Y.) 556, 75 N. Y. S. 1008, affd. 77 App. Div. (N. Y.) 643, 79 N. Y. S. 1145 (contract to pay value of property damaged or the cost of repairing same); Austin v. Miller, 74 N. Car. 274 (contract to return a horse unhurt or pay its value). But if the contract is to return the bailment in good condition, or in as good condition as when received, ordinary wear and tear excepted, and there is no stipulation to pay the value in case of failure to return, the weight of authority would hold that there is no intention to enlarge the common-law liability of the bailee. Seevers v. Gabel, 94 Iowa 75, 62 N. W. 669, 27 L. R. A. 733, 58 Am. St. 381; St. Paul &c. Co. v. Minneapolis &c. Co., 26 Minn. 243, 2 N. W. 700, 37 Am. Rep. 404; cases cited in note, 15 Am. & Eng. Ann. Cas. 163. Contra, Harvey v. Murray, 136 Mass. 377; Direct Nav. Co. v. Davidson, 32 Tex. Civ. App. 492, 74 S. W. 790; Harms v. City of New York, 125 N. Y. S. 477, 69 Misc. (N. Y.) 315; Woodward v. Cutter, 33 Vt. 49.

[77] Grady v. Schweinler, 16 N. Dak. 452, 113 N. W. 1031, 14 L. R. A. (N. S.) 1089n, 125 Am. St. 674, 15 Am. & Eng. Ann. Cas. 161.

[78] Schouler Bailments (3d ed.), § 159.

[79] Schouler Bailments (3d ed.), § 159; Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435.

stitute a conversion,[80] unless the letter elected to continue the bailment.[81] If the article has sustained damages, or has been used unauthorizedly, the bailee is liable for the full damages, even though the owner receives it back.[82] The claim of one who has superior rights to the bailor may excuse redelivery to him.[83]

The measure of damages for the unauthorized use of the property of another by a bailee is not the value that may be produced by the labor and investment of the wrongdoer, combined with such use of the property, but is the value of the use itself and any damage that may be done to the property in so using it, or if the use amounts to a conversion, then the measure of damages will be the value of the property itself.[84] Compensation must be made according to the agreement of the parties, or if not fixed by agreement, according to usage, or a reasonable amount.[85] If accomplishment of the bailment purpose becomes impossible from the destruction of the chattel without fault of either party, the bailee is not liable for the agreed compensation,[86] nor the bailor for the failure of the use.[87] But for services which the bailee has received before the destruction, he must pay what the use was worth,[88] or under the rule in some jurisdictions, where a contract is divisible, a pro rata apportionment of the agreed price.[89] If the letter's fault has prevented the contemplated use, the bailee owes him no compensation,[90] but if the

[80] Story Bailments (9th ed.), § 414; In re Ware, 5 Ch. Div. 866; Benje v. Creagh's Admr., 21 Ala. 151; Vaughan v. Webster, 5 Harr. (Del.) 256; Willard v. Bridge, 4 Barb. (N. Y.) 361.

[81] Benje v. Creagh's Admr., 21 Ala. 151.

[82] Bigbee v. Coombs, 64 Mo. 529; Reynolds v. Shuler, 5 Cowen (N. Y.) 323.

[83] European &c. Royal Mail Co. v. Royal Mail Steam-Packet Co., 10 C. B. (N. S.) 860; Erwin v. Arthur, 61 Mo. 386.

[84] See Negus v. Simpson, 99 Mass. 388; State v. State Journal Co., 75 Nebr. 275, 106 N. W. 434, 13 Am. & Eng. Ann. Cas. 254.

[85] Hale Bailments, pp. 45, 210; Schouler Bailments (3d ed.), § 160; United States v. Shea, 152 U. S. 178, 38 L. ed. 403.

[86] Taylor v. Caldwell, 3 Best. & S. 826, 113 E. C. L. 824; Collins v. Woodruff, 9 Ark. 463; Bacot v. Parnell, 2 Bail. (S. Car.) 424.

[87] Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215n.

[88] Williams v. Holcombe, 1 N. Car. L. Repos. 365; Bacot v. Parnell, 2 Bailey (S. Car.) 424; Ripley v. Wightman, 4 McCord (S. Car.) 447.

[89] Collins v. Woodruff, 9 Ark. 463; Williams v. Holcombe, 1 N. Car. L. Repos. 365; Muldrow v. Wilmington &c. R. Co., 13 Rich. (S. Car) 69; George v. Elliott, 2 Hen. & M. (Va.) 5.

[90] Hickok v. Buck, 22 Vt. 149.

carrying out of the bailment purpose was prevented by something not the fault of the bailor or not the destruction of the chattel, the bailee must pay the agreed compensation.[91] And if the bailee pays, as for the total loss or destruction of the article, he becomes the owner, and is subrogated to the letter's rights.[92]

[91] Hale Bailments, p. 211. Bailments (9th ed.), § 414; Schouler
[92] Hale Bailments, p. 209; Story Bailments (3d ed.), § 161.

CHAPTER V.

CONTRACTS OF HIRING SERVICES ABOUT A THING.

§ 87. Contracts of hiring services about a thing—Operis bailments.
88. Creation of the relation.
89. Title and accession—Bailee's special property.
90. Diligence and skill required of bailee.
91. Expenses and insurance.
92. Compensation—Where work incomplete.
93. Compensation—Where work completed, but not according to contract.
94. Bailee's lien for amount of compensation.

§ 87. Contracts of hiring services about a thing—Operis bailments.—The classification of contracts of hiring before given embraced four classes, of which the latter three may be grouped for practical treatment as those in which the bailor contracts for services about a thing, which may be its custody, work upon it, or its carriage. The distinguishing feature of this group is the fact that the bailee performs services for the bailor, and the bailor pays a compensation to him, while the classes differ from each other only in the character of the services. The gratuitous bailments for the benefit of the bailor resemble the operis bailments for mutual benefit, the only difference being that in the present class the bailee receives a reward for the performing of services similar to those which in the other class he performed gratuitously, and is therefore held to a higher degree of care in their performance. The exceptional bailments of the innkeeper, the post-office, and the common carrier are also branches of the locatio operis bailment, which will be considered separately. In the sections immediately succeeding we shall discuss contracts involving the doing of something about things hired, as where artisans are employed to make or repair chattels, or factors to sell them, or those not common carriers are hired to carry them,[1] while in later sections mention will be made of the

[1] Among other bailments of this class are the delivery of cotton to be ginned (Hackney v. Perry, 152 Ala. 626, 44 So. 1029; Sea Ins. Co. v. Vicksburg &c. R. Co., 159 Fed. 676, 86 C. C. A. 256, 17 L. R. A. (N. S.)

respects where the bailment merely for the custody of things differs from that where the bailment is for feasance. The bailments for custody include those entered into by warehousemen, agisters, wharfingers, forwarders, elevators and cold storage companies, safe deposit companies, and similar relations. The general principles of the law of bailments apply to these contracts, and, with a slight change of terms, what has been said concerning the hiring of the use of a thing would equally apply to the hiring of services about a thing. The aim of the following sections will only be to give specific applications of these principles brought about by the peculiar circumstances of the relationship entered into between the parties to the bailment.

§ 88. **Creation of the relation.**—The bailment relation in this class arises out of an express or implied contract. The rights of the parties may be changed by express contract to any extent not forbidden by public policy, but unless this is done, their rights are governed by well-settled principles. Where one is hired to do work upon a thing, the bailment relation begins upon delivery and acceptance by him, and thereupon he takes up the duties and liabilities implied by law. There is no bailment unless the property is delivered into the possession of the workman, for one who makes repairs upon a thing in the owner's possession is not a bailee, but a servant or employé, whose rights are determined by contract.[2]

§ 89. **Title and accession—Bailee's special property.**—The delivery of cloth to a tailor or to a factory to be made into clothes, of jewelry to a jeweler to be repaired, or materials to him from which jewelry is to be made, of shoes to a cobbler to be

925n), the delivery of carpet to be cleaned (Bowen v. Isenberg Bros. Co. (Del. Super. Ct.), 67 Atl. 152), of an automobile to be repaired (Ford Motor Co. v. Osburn, 140 Ill. App. 633), or a carriage for repairs (Studebaker Bros. Mfg. Co. v. Carter, 51 Tex. Civ. App. 331, 111 S. W. 1086). Where the owner of timber and a saw-mill employs one to take possession of the mill and timber and saw the timber into lumber, the latter is held a bailee of the timber and lumber. Chaffin v. State, 5 Ga. App. 368, 63 S. E. 230. One who in consideration of a purchase of goods agrees to receive, care for and ship other goods purchased elsewhere is a bailee for hire. Michigan Stove Co. v. Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340.

[2] Street Found. Leg. Liab., vol. 2, ch. 28, p. 289.

repaired, of clothing to a pressing or cleaning establishment or to a laundry, of a horse to a blacksmith to be shod, of an automobile to a garage-keeper for repairs, of a carriage or wagon to one for repairs, of lumber to a mechanic to have an article of furniture made therefrom, of cotton to a compress company to be ginned,—these are familiar examples of the bailing of a chattel to have work done upon it. In many of these instances, notably where the purpose of the bailment is repair, the bailee adds to the materials furnished by the bailor materials of his own, which become attached to the bailed chattel and a part of it, and in all of these bailments the value of the chattel bailed is augmented by the labor performed upon it. The question then arises, especially where the article is destroyed before the bailment purpose is completed, or where third persons interfere with the bailee's possession, in whom is the title to the property? It is the doctrine of accession that the materials and labor furnished by the bailee become a part of the chattel, even if the materials are of greater value than the chattel, and if the bailor has furnished simply raw material, he has the title to the finished product, in both instances the increased value from the materials and the labor furnished by the workman being added to his property by accession.[3] On the other hand, where the workman himself furnishes the material to make a chattel, it is not a bailment, but an executory contract of sale, and the title is in the workman until delivery of the completed chattel to the vendee.[4] And the general rule is that where material is furnished by one to be worked upon by another, the product to be sold in the market and the proceeds divided, the relation between the parties is a bailment, and not a partnership or joint undertaking.[5] But in this as in other bailments, the bailee has a special property in the thing bailed, and in this case his interest increases in value during the accomplishment of the bailment purpose. He has the right

[3] Pulcifer v. Page, 32 Maine 404, 54 Am. Dec. 582 and note; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534n.

[4] See cases cited in note 3. See Central Lith. & Eng. Co. v. Moore, 75 Wis. 170, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. 186.

[5] Sattler v. Hallock, 15 App. Div. (N. Y.) 500, 44 N. Y. S. 543, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. 686; Gregory v. Stryker, 2 Denio (N. Y.) 628; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215n; Pierce v. Schenck, 3 Hill (N. Y.) 28.

to possession, even against the bailor, and may bring trespass or trover to maintain his interest against any one who takes the chattel from his possession.[6] But the bailor has the right to sue a third party at any time, even before the expiration of the bailment, and recover for permanent injury to the property, since he has a reversionary interest.[7] A bailee for hire under a contract to transport and store cement for the bailor, who has also made a separate contract to purchase a quantity of cement from the bailor, cannot fill his order himself from the property in his possession as bailee, without the bailor's consent, and his attempt to do so will justify the bailor's termination of the contract of bailment.[8]

§ 90. Diligence and skill required of bailee.—This is a bailment for mutual benefit, and in accomplishing the bailment purpose the bailee must use ordinary diligence. It may be said generally, that "it is the duty of the bailee to receive, care for and keep the materials or things furnished for the undertaking until delivery to the bailor according to the contract, or until for other reasons the bailment is terminated; to perform the services in good faith, and as required by the undertaking; to do the work well and produce the result of the undertaking within the time agreed upon; to use the skill and diligence required, or the skill and judgment claimed by him, the bailee, to be required to exercise good faith in all things pertaining to the contract, deal honestly and redeliver the property to the bailee when the contract is fulfilled. * * * In exercising all and each of these requirements he must use ordinary diligence, and if he fails to do so and injury results therefrom to the bailor, he will be liable therefor."[9] And the rule is that if the bailee fails to perform his contract obligations in that the work was defectively and improperly done, the bailor may refuse to pay him for his materials

[6] Schouler Bailments (3d ed.), § 110; Evans v. Nichol, 4 Scott N. R. 43; Shaw v. Kaler, 106 Mass. 448; Burdict v. Murray, 3 Vt. 302, 21 Am. Dec. 588.

[7] McGraw v. Patterson, 47 Ill. App. 87; Shaw v. Kaler, 106 Mass. 448; Howard v. Farr, 18 N. H. 457; New Jersey Elec. R. Co. v. New York, L. E. & W. R. Co., 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849 and note; Butts v. Collins, 13 Wend. (N. Y.) 139.

[8] Atlantic Bldg. Supply Co. v. Vulcanite Portland Cement Co., 203 N. Y. 133, 96 N. E. 370, 36 L. R. A. (N. S.) 622 and note.

[9] Van Zile Bailments (2d ed), § 140.

and labor, and does not lose his right to do this because he takes back the property, for it was his already.[10] Generally the bailee may employ servants or agents to perform the services required, unless the nature of the employment requires his personal services, as when a painter is employed to paint a picture, and he is liable for injury caused by acts of such servants within the course of their employment.[11] The bailee must perform the work with the skill and ability which the particular work requires,[12] and is under a common-law liability to use such reasonable skill as the undertaking demands to do the work in a reasonable and proper manner, whatever its nature.[13] So where a dress was delivered to a dressmaker without any instructions, and she made it up with the cloth wrong side out, the court held that an action could be maintained against her as not having used the degree of care and skill which would enable a dressmaker to do the work entrusted to her in a proper manner.[14] It is said, "Every mechanic who takes any material to work up for another in the course of his trade, as where a tailor receives cloth to be made into a coat, or a jeweler a gem to be set or engraved, is bound to perform it in a workmanlike manner."[15] It does not matter that the bailee has not the required skill; he is liable from the fact that he has held himself out as possessing the skill requisite.[16] Since the

[10] McKibben v. Bakers, 1 B. Mon. (Ky.) 120; Dale v. See, 51 N. J. L. 378, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. 688; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534.

[11] Van Zile Bailments (2d ed.), § 148.

[12] Fireman's Fund Ins. Co. v. Schreiber (Wis.), 135 N. W. 507. See opinion for complete discussion of liability of bailee for hire for acts of his servants.

[13] Story Bailments (9th ed.), § 431; Lincoln v. Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. 480; Jackson v. Adams, 9 Mass. 484, 6 Am. Dec. 94; Dale v. See, 51 N. J. L. 378, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. 688; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534; P. H. Gill &c. Mach. Works v. Detroit-Cadillac &c. Car. Co., 139 App. Div. (N. Y.) 205, 123 N. Y. S. 621; Rodgers v, Grothe, 58 Pa. St. 414. It is a sufficient defense, in an action to recover the value of theatrical costumes delivered to be cleaned and not returned, to show that defendant employed a competent man to do the work, employed the best known process, and used special care, but in spite of such care the materials used in cleaning were unaccountably ignited, and fire resulted, destroying some costumes and damaging others, and an offer was made to repair the damaged goods and put them in as good condition as before. Gingerbread Man Co. v. Schumacher, 35 Pa. Super. Ct. 652.

[14] Lincoln v. Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. 480.

[15] 2 Kent Com. 588; Keith v. Bliss, 10 Ill. App. 424.

[16] Van Zile Bailments (2d ed.), § 151; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534.

bailment is of mutual benefit, he is held only to the exercise of ordinary skill, but this ordinary skill is such skill as the ordinary skilful workman in such kind of work would exercise upon his own material in performing a similar service under the particular circumstances,[17] and the value, difficulty of accomplishment, or delicacy of the work to be done has a great bearing on the degree of skill required. A corporation engaged in the general messenger business "impliedly contracts that the messengers whom it furnishes are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons."[18] But if the bailor knows that the bailee is not possessed of the requisite skill when he hires him, the bailor cannot, it seems, recover damages for the bailee's failure to use it.[19]

If the bailee can show that the ordinary skill of a workman in the same line of work was used, or that the defective workmanship was the fault of the bailor, in that the work was done according to his directions, or that the property or materials furnished were defective, or that the bailor did not furnish the necessary funds to purchase the proper materials for the work, and refused to expend more, and the bailee used the best materials obtainable for the amount, and used reasonable skill—in any of these cases he may defend against the bailor in an action for damages caused by his failure to use due skill.[20] A bailee cannot impose conditions binding upon the owner after the work has been done, or at any time after the original contract is made, as where silk was sent to a dyer, and a short time after its return, it was found to have been damaged in the dyeing, but no notice was given to the bailee for some months. The latter could not defend upon the ground that when the silk was returned a notice was printed on the bill which recited that all claims for deficiencies or damages must be made within three days in order

[17] Van Zile Bailments (2d ed.), § 152; Dale v. See, 51 N. J. L. 378, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. 688.

[18] Haskell v. Boston District Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. 324.

[19] Van Zile Bailments (2d ed.), § 155.

[20] Van Zile Bailments (2d ed.), § 155.

to be allowed.[21] As said before, since the title to the property is at all times in the bailor, his taking back the property is not a waiver of defective or unskilful workmanship, but, on the other hand, he may not retain material for an unreasonable time, without informing the bailee of defects of which he does or could know in due diligence, and because of such defects refuse to recompense the bailee for the work.[22]

§ 91. **Expenses and insurance.**—Expenses ordinarily incidental to the execution of the bailment purpose must be borne by the bailee, for he is presumed to have included these in his compensation.[23] The same rule applies to extraordinary expenses as in other bailments.[24] The special property of a bailee hired to do work upon a thing is a sufficient interest that he may insure the subject of the bailment.[25] He may recover the entire loss, and not merely the value of his interest, since he is accountable to the owner for the goods, and he holds any excess as trustee for the bailor.[26]

§ 92. **Compensation—Where work incomplete.**—If the purpose of the bailment is fully executed, and carried out according to the intent of the parties, of course the bailee is entitled to the agreed compensation, or if there was no agreement, to a reasonable compensation, or the customary compensation.[27] But questions regarding the amount of compensation to be paid to the bailee frequently arise when the work was not completed, or

[21] Dale v. See, 51 N. J. L. 378, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. 688.

[22] Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534 (see dissenting opinion by O'Brien, J., in this case).

[23] Story Bailments (9th ed.), §§ 425, 426, 441; Schouler Bailments (3d ed.), § 114; 2 Kent Com. 590; Whitlock v. Heard, 13 Ala. 776, 48 Am. Dec. 73.

[24] See supra, § 14.

[25] Waters v. Monarch Life Assur. Co., 5 El. & Bl. 870; Fire Ins. Assn. v. Merchants' & Miners' Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; Sheppard v. Peabody Ins. Co., 21 W. Va. 368.

[26] Reitenbach v. Johnson, 129 Mass. 316; Stillwell v. Staples, 19 N. Y. 401; Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606; Lancaster Mills v. Merchants' Cotton-Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 32 L. ed. 730, 10 Sup. Ct. 365. And where the bailee has insured the entire property, the owner may adopt such insurance, and obtain the benefit, even after loss. Fire Ins. Assn. v. Merchants' & Miners' Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606.

[27] Hale Bailments, p. 222. See § 86 supra.

when the work was completed, but not in accordance with the contract. The completion of the work may be prevented in one of three ways, by destruction of the chattel, by the fault of the bailor, or by fault of the bailee. If the thing perishes in the possession of the bailee, and without his fault, the bailor must bear the loss, since the title to the property and its accessions is his, and he must also compensate the workman for his labor, and his materials used, the reason for this being the maxim "res periit domino."[28] But it has been said that if the contract is to do the work by the job, and the thing perishes accidentally without default on either side before the job is finished, the workman will lose his work, and receive no compensation, the contract being treated as an entirety, and the employer will lose the chattel.[29] So, of course, if the workman were to furnish all or the principal materials, in which case he is the owner of the chattel until delivery to the vendee, the maxim "res periit domino" equally applies, and the workman must lose all.[30] But if the work was done in an imperfect or defective manner, in such a way as to give the employer a defense in a demand for the price, had it been completed, he may apply the same defense to a demand for compensation after loss.[31] If the chattel is accidentally lost after the work is completed, but before delivery back to the bailor, and without fault of the bailee, the latter is entitled to full compensation.[32] Where there has been a general contract of hiring and the workman has imperfectly done the work, he is entitled to recover on the quantum meruit the reasonable value of the work, after deducting the employer's damages, under the circumstances, if it has any value.[33] But if he has failed to complete the contract through his own wilful neglect or refusal, and the contract is

[28] Menetone v. Athawes, 3 Burr. 1592; Gillett v. Mawman, 1 Taunt. 137; Laborwitz v. Frankfort, 4 Misc. (N. Y.) 275, 53 N. Y. St. 525, 23 N. Y. S. 1038; Cohen v. Moshkowitz, 17 Misc. (N. Y.) 389, 39 N. Y. S. 1084; Central &c. Co. v. Moore, 75 Wis. 170, 17 Am. St. 186.

[29] Story Bailments (9th ed.), §§ 426, 426a; 2 Kent Com. 590; Appleby v. Myers, L. R. 2 C. P. 651; Brumly v. Smith, 3 Ala. 123; Stern v. Rosenthal, 56 Misc. (N. Y.) 643, 107 N. Y. S. 772.

[30] Schouler Bailments (3d ed.), § 111.

[31] 1 Bell Comm. (7th ed.), p. 456.

[32] Van Zile Bailments (2d ed.), § 139; Schouler Bailments (3d ed.), § 111; 1 Bell Comm. (7th ed.), p. 456.

[33] Farnsworth v. Garrard, 1 Camp. 3, 9; Basten v. Butter, 7 East 479; Grant v. Button, 14 Johns. (N. Y.) 377.

entire, he may recover nothing.[34] If the act or negligence of the bailor prevents completion, he may recover full compensation.[35] And as said before, if the chattel was destroyed by an unavoidable accident, he may recover pro tanto under the general contract.[36] If there is a special contract, the workman may not recover upon it unless it is fully complied with, since if he has deviated from the contract, he is not entitled to recover, for such is a violation of the contract and not a fulfilment,[37] and if the work is not completed, he cannot recover because it is unexecuted, and his own default will not permit him to rescind it.[38] It is stated by Mr. Hale as the better rule in such cases, as to the bailee's right to recover upon the quantum meruit: "If the special contract still remains open, and is unexecuted by the misconduct or default of the workman, he cannot recover anything for his work and labor and materials employed in part fulfilment of the contract.[39] If the contract has been rescinded by the parties, or the work has not been completed from inevitable accident, and is incapable of being completed, or if the employer has prevented or dispensed with the due execution thereof, the workman is entitled, in the former case, to a compensation pro tanto for the work done, unless there is something in his contract that prevents it;[40] and, in the latter case, to a full compensation, on account of the default on the other side."[41]

§ 93. **Compensation—Where work completed, but not according to contract.**—The compensation recoverable where the work has been completed, but there has been a deviation from the plans of the contract, or an improper execution, or the work

[34] Sinclair v. Bowles, 9 Barn. & C. 92; Faxon v. Mansfield, 2 Mass. 147.

[35] Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285.

[36] Menetone v. Athawes, 3 Burr. 1592; Russell v. Koehler, 66 Ill. 459; Smith v. Meegan, 22 Mo. 150, 64 Am. Dec. 259; Waller v. Parker, 5 Coldw. (Tenn.) 476.

[37] Ellis v. Hamlen, 3 Taunt. 52; Taft v. Montague, 14 Mass. 282; Jewell v. Schroeppel, 4 Cowen (N. Y.) 564; Sickels v. Pattison, 14 Wend. (N. Y.) 257.

[38] Jennings v. Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367.

[39] Hale Bailments, p. 219; Sinclair v. Bowles, 9 Barn. & C. 92; Faxon v. Mansfield, 2 Mass. 147; Clark v. Smith, 14 Johns. (N. Y.) 326; Jennings v. Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; Champlin v. Butler, 18 Johns. (N. Y.) 169.

[40] Robson v. Godfrey, 1 Starkie 275; Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285.

[41] Koon v. Greenman, 7 Wend. (N. Y.) 121; Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285.

has not been completed by the stipulated time, is dependent upon the circumstances. If the work done is of no use, service or value, the workman cannot recover any compensation, and may be liable to the employer for damages to the materials.[42] But it has been held that if the work, though not properly done, is of some use or value to the employer, the workman may recover on the quantum meruit the amount actually worth to the employer under the circumstances deducting damages occasioned by the faulty performance;[43] and that if the work was properly done, but not within the stipulated time, he is entitled to the full compensation after deducting damages for loss occasioned by the delay.[44] If the bailee has departed from the contract, by doing a superior quality of work or using better materials, he can recover no added compensation, unless the departure was by the consent or acquiescence of the bailor, when he may recover the original contract compensation and on the quantum meruit for the additional services.[45] If the employer has assented that the work be left incomplete, or with full knowledge has accepted defective work, which must be shown by his doing more than merely taking back his property, under some circumstances the workman may recover full compensation.[46]

§ 94. Bailee's lien for the amount of compensation.— The general rule is that every bailee for hire who performs services upon or about the personal goods for another has a lien thereon for a reasonable compensation.[47] And this includes mechanics, artisans, tradesmen or laborers who receive property

[42] Higman v. Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. 33; Jones v. Foreman, 93 Iowa 198, 61 N. W. 846; McKibben v. Bakers, 1 B. Mon. (Ky.) 120; Dale v. See, 51 N. J. L. 378, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. 688; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534; May v. Gunther, 20 Misc. (N. Y.) 659, 46 N. Y. S. 379.

[43] Taft v. Montague, 14 Mass. 282; Jewell v. Schroeppel, 4 Cow. (N. Y.) 564; Feeter v. Heath, 11 Wend. (N. Y.) 477; Hillyard v. Crabtree's Admr., 11 Tex. 264, 62 Am. Dec. 475.

[44] Jewell v. Schroeppel, 4 Cow. (N. Y.) 564; Philips v. Rose, 8 Johns. (N. Y.) 392; Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285.

[45] 1 Bell Comm. (7th ed.) p. 455; Lovelock v. King, 1 Moody & R. 60; Robson v. Godfrey, 1 Starkie 220; Pepper v. Burland, Peake (1790-1794) 103; Wilmot v. Smith, 3 Car. & P. 453; Bank of Columbia v. Patterson's Admr., 7 Cranch (U. S.) 299, 3 L. ed. 351.

[46] Burn v. Miller, 4 Taunt. 745; Linningdale v. Livingston, 10 Johns. (N. Y.) 36; Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285; Hollinsead v. Mactier, 13 Wend. (N. Y.) 276.

[47] Hale Bailments, p. 222; Van Zile Bailments (2d ed.), § 159; Wilson v. Martin, 40 N. H. 88.

to repair or clean, or otherwise work upon,[48] also warehousemen, who merely keep goods,[49] and carriers who transport them.[50] Formerly, liens were restricted to carriers, innkeepers, and the like, who were under obligations to receive goods for the public;[51] then the artisan who had by his labor enhanced the value of a bailed chattel was allowed a lien,[52] and now in most instances where a bailee is hired to perform services upon the chattel he is held to have a lien, though the general statement that the article must have been enhanced in value or there is no lien seems scarcely applicable to a warehouseman.[53] In fact, it seems that the right of a bailee to demand compensation for services carries the right to secure that compensation by a particular lien upon the property.[54] Yet, at common law, a livery stable keeper or agister has no lien upon an animal for its keep,[55] but in most states such a lien is given by statute.[56]

The lien in bailments of hiring is particular, upon the particular goods for the particular services rendered, and not a general lien upon any goods of the bailor for any amounts owing to the bailee.[57] Since a lien is merely a right to retain possession of another's property until some charge thereon is paid, it follows that the lien is lost when possession is lost, unless possession is surrendered through fraud or mistake, and a lien once lost cannot be restored by restored possession.[58] And as the lien is personal in nature, and dependent upon possession, it cannot be assigned, for when possession is surrendered to

[48] Cowper v. Andrews, Hob. 39; Case of an Hostler, Yel. 66; Oakes v. Moore, 24 Maine 214, 41 Am. Dec. 379; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

[49] See § 101, infra.

[50] See §§ 121 et seq.

[51] Wilson v. Martin, 40 N. H. 88.

[52] Story Bailments (9th ed.), § 453a; Hale Bailments, p. 223; Van Zile Bailments (2d ed.), § 159.

[53] Hale Bailments, p. 224; Story Bailments (9th ed.), § 453a.

[54] Schouler Bailments (3d ed.), § 122.

[55] Jackson v. Cummins, 5 M. & W. 342; Miller v. Marston, 35 Maine 153, 56 Am. Dec. 694; Harris v. Woodruff, 124 Mass. 205, 26 Am. Rep. 658; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

[56] Hale Bailments, p. 224; Van Zile Bailments (2d ed.), § 162.

[57] Green v. Farmer, 4 Burr. 2214; Miller v. Marston, 35 Maine 153, 56 Am. Dec. 694; Mathias v. Sellers, 86 Pa. St. 486, 27 Am. Rep. 723; Moulton v. Greene, 10 R. I. 330. But where an artisan received skins to be worked up into garments, he may hold the residue of any given lot for the whole sum due on any particular lot. In re Lindau, 183 Fed. 608.

[58] Holderman v. Manier, 104 Ind. 118, 3 N. E. 811; Nevan v. Roup, 8

an assignee, the lien is lost.[59] This is one reason why a livery stable keeper was not considered to have a lien at common law, since the owner of the horse was constantly taking the horse into his possession for use, thus interrupting the bailee's possession.[60] If the bailment is made without the consent of the owner, the bailee has no lien as against him.[61] A subcontractor or servant employed by the bailee has no lien for there is no privity between him and the bailor.[62] The whole lien extends to every part of the goods embraced in one contract of bailment, and no part of it is lost by the delivery up of part of the property, the lien being released as to the property delivered, but the whole lien attaching to the part retained in the bailee's possession.[63] Under the common law, the bailee for hire has no power of sale to satisfy his lien, and has merely the right to retain possession of the goods until his demands are satisfied, unless given a power of sale by contract or statute, and if such a remedy is given by statute, the statute must be complied with strictly, being in derogation of the common law.[64] The lien is terminated by payment of the debt,[65] by loss of possession of the property,[66] or may be waived by acts of the bailee inconsistent with the existence of a lien,[67] and an agreement to give credit, or a special contract for a method of payment inconsistent with a lien, is held a waiver.[68]

Iowa 207; In re Merrick, 91 Mich. 342, 51 N. W. 890; Danzer v. Nathan, 145 App. Div. (N. Y.) 448, 129 N. Y. S. 966; McDougall v. Crapon, 95 N. Car. 292; Kitteridge v. Freeman, 48 Vt. 62. Artisan's lien on silk for work done thereon ceases when silk repasses into bailor's hands. Delaware, L. & W. R. Co. v. David (N. J.), 82 Atl. 516.

[59] Van Zile Bailments (2d ed.), § 72; Robinson v. Larrabee, 63 Maine 116; Morse v. Androscoggin R. Co., 39 Maine 285; Stickney v. Allen, 10 Gray (Mass.) 352; Kitteridge v. Freeman, 48 Vt. 62.

[60] Hale Bailments, p. 225.

[61] Clark v. Hale, 34 Conn. 398; Hanch v. Ripley, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61; Globe Works v. Wright, 106 Mass. 207; White v. Smith, 44 N. J. L. 105; Hill v. Burgess, 37 S. Car. 604, 15 S. E. 963.

[62] 1 Jones Liens, §§ 721, 737, 738; Jacobs v. Knapp, 50 N. H. 71; Gross v. Eiden, 53 Wis. 543, 11 N. W. 9.

[63] In re Lindau, 183 Fed. 608; New Haven & Northhampton Co. v. Campbell, 128 Mass. 104, 35 Am. Rep. 360; Schmidt v. Blood, 9 Wend. (N. Y.) 268; Morgan v. Congdon, 4 N. Y. 552; Solomon v. Bok, 49 Misc. (N. Y.) 493, 98 N. Y. S. 838; Hensel v. Noble, 95 Pa. St. 345, 40 Am. Rep. 659.

[64] 1 Jones Liens, § 1033; Hale Bailments, p. 234; Lickbarrow v. Mason, 6 East 21; Doane v. Russell, 3 Gray (Mass.) 382; Busfield v. Wheeler, 14 Allen (Mass.) 139.

[65] See note 47 et seq.

[66] See cases cited in note 58.

[67] Alabama Cotton Oil Co. v. Weeden, 150 Ala. 587, 43 So. 926; Brackett v. Pierson, 114 App. Div. (N. Y.) 281, 99 N. Y. S. 770.

[68] Hale v. Barrett, 26 Ill. 195; Tucker v. Taylor, 53 Ind. 93; Rob-

The priority of the lien of the bailee who works upon a chattel depends entirely upon the circumstances of the contract of bailment. The general rule is that such a lien is inferior to a mortgage recorded prior to the bailment for work.[69] But it seems that a workman's lien for repairs necessary to preserve a chattel may be superior to the rights of a mortgagee, whose mortgage is of record, as where a workman who repaired a canal-boat which had sunk and which would have been useless without repair was held to have a lien for such services prior to the rights of the mortgagee.[70]

inson v. Larrabee, 63 Maine 116; Morrill v. Merrill, 64 N. H. 71, 6 Atl. 602; Bailey v. Adams, 14 Wend. (N. Y.) 201; Murphy v. Lippe, 35 N. Y. Super. Ct. 542.

[69] Bissell v. Pearce, 28 N. Y. 252; McGhee v. Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654.

[70] Williams v. Allsup, 10 C. B. (N. S.) 417; Hammond v. Danielson, 126 Mass. 294; Scott v. Delahunt, 5 Lans. 372, 65 N. Y. 128.

CHAPTER VI.

CONTRACTS OF HIRING—THE CUSTODY OF A THING.

§ 95. Bailments of hired custody.
96. Warehouseman defined—Public and private warehouseman.
97. Delivery and acceptance—Commencement of liability.
98. Warehouse receipts—Their effect and assignability.
99. Warehouse receipt as a contract—Its effect in limiting liability.
100. Duties and liabilities of warehouseman.
§ 101. Further of the warehousing relationship — Warehouseman's lien.
102. Redelivery—Presumption in case of injury of relation. case of injury to goods—Termination of relation.
103. Wharfingers.
104. Factors and commission merchants.
105. Safe-deposit companies.
106. Public officers as bailees.
107. Other bailments for custody — Agisters and livery stable keepers.

§ 95. Bailments of hired custody.—The only real distinction between bailments for the custody of chattels and bailments of chattels for work thereupon is usually in the character of services rendered. All the general principles of bailments apply to these contracts as well as to other bailments for hire. We shall proceed to note some of the special applications of these principles to the relationship of custodian, in so far as these applications are peculiar. First will be considered warehousemen, including storage-house keepers, elevators, and common carriers when holding goods in storage; next, wharfingers, factors, and forwarders, safe-deposit bailees, and other custodians, such as public officers.

§ 96. Warehouseman defined—Public and private warehousemen.—A warehouseman is one who, as a business, receives the goods and merchandise of others to be stored in his warehouse for hire.[1] By statute in some of the states certain

[1] For other definitions see Bouvier Law. Dict.; Goddard Bailments, § 150; Van Zile Bailments (2d ed.), § 167; Snydacker v. Blatchley, 177 Ill. 506, 52 N. E. 742, citing Bucher v. Commonwealth, 103 Pa. St. 528; Moors v. Jagode, 195 Pa. St. 163, 45 Atl. 723. For discussion of ware-

classes of warehousemen, especially the owners of grain elevators, are made public warehousemen, under the obligation to store for all who may apply, in a manner analogous to the obligation of the innkeeper or carrier, but as a rule warehouses are not public, and the owner is under no obligation to receive goods for all.[2] Bonded warehouses are those designated by the United States government for the reception and storage of imports until duties have been paid, and they are held to be private warehouses.[3]

§ 97. **Delivery and acceptance—Commencement of liability.**—It is generally necessary that the property should be in the possession of the warehouseman and under his control in order that he shall be held for the care of the goods, but it is not necessary that the property should have been stored away first.[4] It is held that his liability begins as soon as the warehouse crane has been attached to the goods,[5] and it is settled that if the warehouseman has consented to take charge of goods before they reach the warehouse, he is liable from that moment.[6] It follows that if there is no delivery and no acceptance, actual or constructive, the warehouseman is not bound. The question as to whether the delivery of goods to a warehouseman constitutes

housemen's liability as bailees, see notes, 136 Am. St. 226, 6 L. R. A. 857, 7 L. R. A. 529. The keeper of a cotton yard who receives compensation for weighing and hauling each bale and is accustomed to keep the cotton in the yard between the time of hauling and weighing, is a custodian for hire, though he receives no compensation for the actual storage. Vogel v. Braudrick, 25 Okla. 259, 105 Pac. 197.

[2] Goddard Bailments, § 149; Van Zile Bailments (2d ed.), § 168; Pontiac Nat. Bank v. Langan, 28 Ill. App. 401; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490; Delaware L. & W. &c. R. Co. v. Central Stock Yards Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855, affd. 46 N. J. Eq. 280, 19 Atl. 185; Brass v. State of North Dakota, 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. 857; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Ogden v. Saunders, 12 Wheat. (U. S.) 359, 6 L. ed. 656.

[3] Macklin v. Frasier, 9 Bush (Ky.) 3; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Fairfax v. N. Y. Central R. Co., 67 N. Y. 11.

[4] Delaware, L. & W. R. Co. v. Central Stockyard Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855, affd. 46 N. J. Eq. 280, 19 Atl. 185; Titsworth v. Winnegar, 51 Barb. (N. Y.) 148; Rodgers v. Stophel, 32 Pa. St. 111, 72 Am. Dec. 775; Blin v. Mayo, 10 Vt. 56, 33 Am. Dec. 155.

[5] Thomas v. Day, 4 Esp. 262; Jeffersonville R. Co. v. White, 6 Bush (Ky.) 251; Merritt v. Old Colony &c. R. Co., 11 Allen (Mass.) 80; De Mott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523.

[6] Merritt v. Old Colony &c. R. Co., 11 Allen (Mass.) 80; Ducker v. Barnett, 5 Mo. 97; Farrell v. Richmond & D. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. 760; Rodgers v. Stophel, 32 Pa. St. 111, 72 Am. Dec. 775.

a bailment or a sale was considered in a previous chapter.[7] The time when the carrier's liability as such terminates and that as warehouseman begins will be considered in the discussion of carriers.[8]

§ 98. **Warehouse receipts—Their effect and assignability.**—Usually upon acceptance of goods the warehouseman issues to the owner a receipt describing the property, with the date of delivery, and the person from whom received, while the undertaking of the warehouseman, the manner of storage of the property, the amount of the charges and other parts of the contract are often set out in the receipt. No particular form is essential, but a mere memorandum is sufficient, if signed by the warehouseman, to hold him to the obligation to redeliver to the bailor or his assignee the goods described.[9] Warehouse receipts are regarded as representative of the goods stored, and their delivery for the purpose of transferring the goods has the same effect as the delivery of the property itself, but no more, passing to the transferee or assignee only the rights of the transferrer, for these receipts are not negotiable in the sense of negotiable commercial paper.[10] The warehouse receipt stands in most respects upon practically the same footing in law as the bill of lading issued by the carrier.[11] The assignment of a receipt in the nature

[7] See §§ 20-23, supra.

[8] See Carrier's liability as warehouseman, infra, §§ 238, 239.

[9] Jones on Pledges (2d ed.), § 298; National Union Bank v. Shearer, 225 Pa. 470, 74 Atl. 351, 17 Am. & Eng. Ann. Cas. 664; Harris v. Bradley, 2 Dill. (U. S.) 284, Fed. Cas. No. 6116. But a mere weighing tag is not a warehouse receipt. Sinsheimer v. Whitely, 111 Cal. 378, 52 Am. St. 192.

[10] State Bank of City of N. Y. v. Waterhouse, 70 Conn. 76, 38 Atl. 904, 66 Am. St. 82; Zellner v. Mobley, 84 Ga. 746, 11 S. E. 402, 20 Am. St. 390; Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350; Broadwell v. Howard, 77 Ill. 305; Dolliff v. Robbins, 83 Minn. 498, 86 N. W. 772, 85 Am. St. 466; Second Nat. Bank v. Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408; National Union Bank of Reading v. Shearer, 225 Pa. St. 470, 74 Atl. 351, 17 Am. & Eng. Ann. Cas. 664 and note; Davis v. Bradley, 28 Vt. 118, 65 Am. Dec. 226. Indorsement in blank and unconditional delivery of warehouse receipts transfers title for valuable consideration. St. Anthony &c. Elevator Co. v. Dawson, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912B. 1337. Receipt for cotton issued by a cotton compress company is not a negotiable instrument under the law merchant, and assignee of such receipt is not a bailor to the warehouseman in the absence of notice to the latter. Stamford Compress v. Farmers' &c. Bank (Tex.), 143 S. W. 1142.

[11] See infra, §§ 148, 149.

of a warehouse receipt, but issued by one who is not a warehouseman, is not an effectual delivery of the goods as against the creditors of the assignor.[12] The general rule holds that the owner of goods may assign or pledge his goods in the custody of a warehouseman by the indorsement and delivery of a warehouse receipt for the same, and that such delivery is equivalent to the delivery of the goods, but if one who is not the owner of the goods transfers such a receipt, he can transfer only the right which he had, and the true owner's rights are not diminished.[13] And a public warehouseman can pledge his own goods in his own warehouse by delivering the warehouse receipt and retaining the goods in his possession.[14] There are some cases holding to the contrary, but these depend mainly upon the construction of statutes as forbidding such pledges.[15] In some states statutes have made warehouse receipts negotiable, but even under these statutes it is held that they are not so in the sense of bills, notes and other representatives of money, but the effect is merely to provide that they may be transferable by indorsement and delivery, and that such delivery is equivalent to a manual delivery of the property.[16] However, under some statutes, the bona fide transferee of the receipt has rights which cannot be defeated by a secret understanding between the warehouseman

[12] Sinsheimer v. Whitely, 111 Cal. 378, 52 Am. St. 192; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Tradesman's Nat. Bank v. Kent Mfg. Co., 186 Pa. St. 556, 65 Am. St. 876; Shepardson v. Cary, 29 Wis. 34; Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. 306, 37 L. R. A. 166, 60 Am. St. 143. See Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. 721.

[13] See cases cited in note 10. State Bank v. Waterhouse, 70 Conn. 76, 66 Am. St. 82.

[14] Ferguson v. Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418; Cochran v. Ripy, 13 Bush (Ky.) 495; Merchants' Bank of Detroit v. Hibbard, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; Eggers v. National Bank of Commerce (sub nomine, Eggers v. Hayes), 40 Minn. 182, 41 N. W. 971; State of N. Dakota v. Robb-Lawrence Co., 17 N. Dak. 257, 115 N. W. 846, 16 L. R. A. (N. S.) 227, and note; Milliorn v. Clow, 42 Ore. 169, 70 Pac. 398; Millhiser Mfg. Co. v. Gallego Mills Co., 101 Va. 579, 44 S. E. 760; Shephardson v. Cary, 29 Wis. 43.

[15] First Nat. Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Yenni v. McNamee, 45 N. Y. 614.

[16] Commercial Bank v. Hurt, 99 Ala. 130, 12 So. 568, 19 L. R. A. 701, 42 Am. St. 38; Canadian Bank v. McCrea, 106 Ill. 281; First Nat. Bank of Louisville v. Boyce, 78 Ky. 42, 39 Am. Rep. 198; Security Bank v. Minneapolis Cold Storage Co., 55 Minn. 107, 56 N. W. 582.

and the owner.[17] Transfer by mere delivery with the intent to pass title will pass all the rights of the transferrer.[18] The assignment passes rights only to the property actually stored, and if it has been incorrectly described, as where a receipt was given purporting to cover fifteen hundred barrels of Portland cement, and the barrels were filled with a worthless material somewhat resembling cement, the warehouseman was not liable to the bona fide purchaser for the cement the barrels were supposed to contain,[19] for it is held that the warehouseman is not bound to inspect packages delivered to him, and is not an insurer of their contents, but the description is for identification only, and represents the property as it appears externally to be.[20] But where the warehouseman has negligently issued receipts for one kind of property, when he knew that a different kind was stored, or from the nature of the goods, or the ordinary course of business should have known, he is estopped from denying that the property described in the receipt was stored, as against an innocent transferee.[21] In all other cases the holder of a receipt has a right only to the goods actually delivered, and the warehouseman's obligation is met by their redelivery.[22]

§ 99. **Warehouse receipt as a contract—Its effect in limiting liability.**—A warehouse receipt issued by a warehouseman and accepted by the owner of goods stored, as containing the terms and conditions upon which the commodity is delivered and received, becomes the contract between the parties, and cannot, ordinarily at least, be contradicted or varied by parol.[23] But if the receipt is silent as to the terms of the contract, these

[17] Anderson v. Portland Flouring Mills Co., 37 Ore. 483, 60 Pac. 839, 50 L. R. A. 235, 82 Am. St. 771; National Union Bank v. Shearer, 225 Pa. St. 470, 74 Atl. 351, 17 Am. & Eng. Ann Cas. 664.

[18] Alabama State Bank v. Barnes, 82 Ala. 607, 2 So. 349; Toner v. Citizens' State Bank, 25 Ind. App. 29, 56 N. E. 731; Rice v. Cutler, 17 Wis. 351, 84 Am. Dec. 747.

[19] Dean v. Driggs, 137 N. Y. 274, 33 N. E. 326, 19 L. R. A. 302, 33 Am. St 721.

[20] Dean v. Driggs, 137 N. Y. 274, 33 N. E. 326, 19 L. R. A. 302, 33 Am. St. 721; Hale v. Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

[21] Van Zile Bailments (2d ed.), § 174; Norton v. Woodruff, 2 N. Y. 153; Hale v. Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

[22] See citations in note 21.

[23] Savage v. Salem Mills Co., 48 Ore. 1, 85 Pac. 69, 10 Am. & Eng. Ann. Cas. 1065. See note, 19 L. R. A. 304.

may be shown by parol, or if the language is ambiguous, it may be interpreted in the light of circumstances and of custom or usage.[24] The warehouseman may limit his liability by the contract contained in the receipt, and the leading case holds that where a receipt was accepted containing the words "Loss or damage by fire, the elements, shrinkage, leakage, or natural decay, at owner's risk," such notice became a part of the contract, and the warehouseman was held not liable for a great loss caused by leakage of liquor stored.[25] The exemption from liability is limited to the excepted causes, and does not relieve the warehouseman from his obligation to use proper care and prudent diligence as to the goods stored.[26] So where the warehouseman was exempted from losses caused by the "elements," it was held that this was equivalent to loss by the acts of God, and that a fire of incendiary origin was not included in the exception.[27] No warehouseman may by contract relieve himself from the consequences of his negligence.[28] It is possible, however, that he may limit the amount for which he is liable, by an express contract, the provisions of which have been fairly accepted, with notice, by the bailee.[29]

[24] Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211; Savage v. Salem Mills Co., 48 Ore. 1, 85 Pac. 69, 10 Am. & Eng. Ann. Cas. 1065.

[25] Taussig v. Bode, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774, 86 Am. St. 250.

[26] Rudell v. Grand Rapids Cold Storage Co., 136 Mich. 528, 99 N. W. 756; Minnesota Butter & Cheese Co. v. St. Paul Cold Storage &c. Co., 75 Minn. 445, 77 N. W. 977, 74 Am. St. 515; Hunter v. Baltimore Packing &c. Co., 75 Minn. 408, 78 N. W. 11.

[27] Pope v. Farmers' Union & Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. 87.

[28] Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S. W. 249, 23 L. R. A. (N. S.) 1205n; Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664; Grenada Cotton Compress Co. v. Atkinson, 94 Miss. 93, 47 So. 644; Collins v. Burns, 63 N. Y. 1; Rapp v. Washington Storage &c. Co., 75 Misc. (N. Y.) 16, 134 N. Y. S. 855; Patterson v. Wenatchee Canning Co., 53 Wash. 155, 101 Pac. 721, 110 Pac. 379; cases cited in note, 136 Am. St. 248.

[29] Van Toll v. South Eastern R. Co., 12 C. B. (N. S.) 75, 31 L. J. C. P. 241; Harris v. Great Western R. Co., 1 Q. B. Div. 515, 17 Eng. R. (Moak.) 156; Marks v. New Orleans Cold Storage Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271, 90 Am. St. 285. Recitals in writings given by a warehouse company to a bailor do not relieve the company from the consequences of its own negligence. A limitation in a receipt and other writings of the company's responsibilities to $50, unless a greater value of the goods were known to the company, is binding on the bailor; and a limitation of liability to $50 for any "piece" meant an individual article with separate identity at the time of storage, and not a concealed portion. Rapp v. Washington Storage &c. Co., 75 Misc. (N. Y.) 16, 134 N. Y. S. 855.

§ 100. Duties and liabilities of warehousemen.—The warehouseman must comply with the contract of storage.[30] If he has contracted to store goods in a specified warehouse or a particular place, and stores them in a different place, it is at his own risk, and he is liable for their injury which occurs even without his own negligence.[31] He is under the general obligation of a bailee for mutual benefit to exercise ordinary diligence in the care of goods stored, and some of the specific obligations involved in this will now be mentioned. His building must be reasonably and ordinarily safe against dangers from within, or hazards from without.[32] The warehouse must be kept free from taint or odor which may injure certain classes of goods, as the odor from pine boards which damages eggs in a cold storage house.[33] He may be negligent in the location of the warehouse, as well as its construction.[34] He is not, however, liable for loss caused by latent defect in his building.[35] The warehouseman is not bound to store the goods in a fireproof building unless he has expressly or impliedly contracted to do so,[36] and is not liable for loss of goods by fire, unless such loss was caused by his negligence or want of precaution for their safety, or that of his employés

[30] Van Zile Bailments (2d ed.), § 180; McRae v. Hill, 126 Ill. App. 349. See cases cited in note 31. The warehouseman may by contract make himself an insurer. Federal Chemical Co. v. Green, 33 Ky. L. 671, 110 S. W. 859.

[31] McCurdy v. Wallblom Furniture &c. Co., 94 Minn. 326, 102 N. W. 873, 3 Am. & Eng. Ann. Cas. 468 and note. See also, Lilley v. Doubleday, 7 Q. B. Div. 510; St. Losky v. Davidson, 6 Cal. 643; Bradley v. Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679, 109 Am. St. 679; McRae v. Hill, 126 Ill. App. 349; Wiley v. Locke, 81 Kans. 143, 105 Pac. 11, 24 L. R. A. (N. S.) 1117n; Hudson v. Columbian Transfer Co., 137 Mich. 255, 100 N. W. 402.

[32] Higman v. Camody, 112 Ala. 267, 20 So. 480, 57 Am. St. 33; Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S. W. 249, 23 L. R. A. (N. S.) 1205; Allen v. Somers, 73 Conn. 355, 47 Atl. 653, 52 L. R. A. 106n, 84 Am. St. 158; Wiley v. Locke, 81 Kans. 143, 105 Pac. 11, 24 L. R. A. (N. S.) 1117n; Cowles v. Pointer, 26 Miss. 253; Muskogee Crystal Ice Co. v. Riley (Okla.), 108 Pac. 629; Godley v. Hagerty, 20 Pa. St. 387, 59 Am. Dec. 731; Moulton v. Phillips, 10 R. I. 218, 14 Am. Rep. 663; cases cited in note, 136 Am. St. 223.

[33] Parker v. Union Ice & Salt Co., 59 Kans. 626, 54 Pac. 672, 68 Am. St. 383. See also, Smith v. Diamond Ice and Storage Co., 65 Wash. 576, 118 Pac. 646, 38 L. R. A. (N. S.) 994.

[34] Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126.

[35] Moulton v. Phillips, 10 R. I. 218, 14 Am. Rep. 663.

[36] Hatchett v. Gibson, 13 Ala. 587; Chicago & A. R. Co. v. Scott, 42 Ill. 132; Clifford v. Universal Storage &c. Co., 52 Misc. (N. Y.) 595, 102 N. Y. S. 460; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143 and note; Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516.

within the scope and course of their employment.[37] The same rule applies to a loss by theft.[38] For loss by the act of God or overwhelming force he is not liable.[39] He must use ordinary precautions to prevent loss from rats and mice,[40] but the warehouseman who has discovered that wheat stored by him is liable to be infected by weevil, who uses ordinary precautions to prevent it, and notifies the owner to remove the grain, is not liable for loss caused by the weevil getting into it.[41] A bailee of goods for cold storage is liable only for failure to keep the room at the ordinary cold storage temperature,[42] but one who has held himself out as storing particular kinds of goods is under the obligation to maintain the proper temperature for the preservation of the goods.[43] It has been held that a warehouseman is not bound to keep his warehouse frost-proof, so that bulbs would not be frozen.[44] The warehouseman who stores explosives with other goods is liable for loss thereby caused.[45] Under some circumstances he may become liable for failure to provide watchmen,[46]

[37] Hatchett v. Gibson, 13 Ala. 587; Gibson v. Hatchett, 24 Ala. 201; Russell v. Koehler, 66 Ill. 459; Drudge v. Leiter, 18 Ind. App. 694, 49 N. E. 34, 63 Am. St. 359; Irons v. Kentner, 51 Iowa 88, 50 N. W. 73, 33 Am. Rep. 119; Yazoo &c. R. Co. v. Hughes, 94 Miss. 242, 47 So. 662, 22 L. R. A. (N. S.) 975n; Fleischman v. Southern R. Co., 76 S. Car. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519; Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516; Lancaster Mills v. Merchant's Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586; cases cited 136 Am. St. 227.

[38] Battelle v. Mercantile W. Co., 139 App. Div. (N. Y.) 649, 124 N. Y. S. 135; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143 and note; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Hutchinson v. United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393n; note 136 Am. St. 228-9.

[39] Abraham v. Nunn, 42 Ala. 51; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Patten v. Baggs, 43 Ga. 167; McCranie v. Wood, 24 La. Ann. 406; American Brewing Assn. v. Talbot, 141 Mo. 674, 42 S. W. 679, 64 Am. St. 538.

[40] Cailiff v. Danvers, 1 Peake (1790-1794) 114, 3 R. R. 666; Laveroni v. Drury, 16 Eng. L. & Eq. 510, 16 Jur. 1024, 22 L. J. Ex. (N. S.) 2; Taylor v. Secrist, 2 Disn. (Ohio) 299; Garrigues v. Coxe, 1 Bin. (Pa.) 592, 2 Am. Dec. 493.

[41] Carley v. Offutt, 136 Ky. 212, 124 S. W. 280, 26 L. R. A. (N. S.) 1114n, 136 Am. St. 207 and note.

[42] Allen v. Somers, 73 Conn. 355, 47 Atl. 653, 52 L. R. A. 106, 84 Am. St. 158.

[43] Sutherland v. Albany Cold Storage & W. Co., 171 N. Y. 269, 63 N. E. 1100, 89 Am. St. 815. See Townsend v. Rich, 58 Minn. 559, 60 N. W. 545. See, generally, as to liability of cold storage warehouseman, note 90 Am. St. 295-302.

[44] Hallock v. Mallett, 13 N. Y. St. 263, 55 N. Y. Sup. Ct. 265.

[45] White v. Colorado Cent. R. Co., 3 McCrary (U. S.) 559, Fed. Cas. 17543. Contra, Collins v. Alabama G. S. R. Co., 104 Ala. 390, 16 So. 140.

[46] Chicago & A. R. Co. v. Scott, 42 Ill. 132. See Evans v. New York & P. S. S. Co., 163 Fed. 405; Derosia v. Winona &c. R. Co., 18 Minn. 133; Batelle v. Mercantile Warehouse Co., 139 App. Div. (N. Y.) 649, 124 N.

and may sometimes become liable for failure to use ordinary diligence to remove goods from threatened danger from fire or flood, if loss is caused by such fire or flood, and an ordinarily prudent man would have removed his own goods.[47]

§ 101. Further of the warehousing relationship—Warehouseman's lien.—The warehouseman may insure the property stored in his own name, and in case of loss collect the whole, standing as trustee for the owner for the amount above his claims.[48] He has such a special property that he may protect the goods by an action.[49] The bailor is held to the exercise of good faith, and if he offers for storage dangerous goods likely to injure other goods stored, it is his duty to inform the warehouseman.[50] The warehouseman has a right to reasonable compensation, usually determined by contract, or the usages of the business,[51] and has a lien to secure this, similar to the lien of any other bailee for hire, it being special and not general.[52] He is, of course, liable for an unauthorized use of the chattels stored, the same as any other bailee,[53] and has even been held guilty of conversion for storing goods in one building when the contract was to store in another.[54] The liability of common carriers as

Y. S. 135. And compare Pike v. Chicago, M. & St. P. R. Co., 40 Wis. 583.

[47] Macklin v. Frazier, 9 Bush (Ky.) 3; H. A. Johnson & Co. v. Springfield Ice &c. Co., 143 Mo. App. 441, 127 S. W. 692; Prince v. St. Louis Cotton Compress Co., 112 Mo. App. 49, 86 S. W. 873.

[48] Baxter v. Hartford Fire Ins. Co., 12 Fed. 481, 11 Biss. (U. S.) 306; Hough v. People's Fire Ins. Co., 36 Md. 398; Lancaster Mills v. Merchants' Cotton-Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868. Under certain circumstances it may become the duty of the warehouseman to insure in the exercise of ordinary diligence, though the rule is that he is not liable for failure to insure. Lancaster Mills v. Merchants' Cotton-Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586. See note 52 L. R. A. 341.

[49] American Storage & Moving Co. v. St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184.

[50] Van Zile Bailments (2d ed.), §§ 181, 182.

[51] Van Zile Bailments (2d ed.), § 213. See cases cited in note 52. In absence of agreement bailee for storage may charge reasonable value for his services. Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459.

[52] Reebie v. Brackett, 109 Ill. App. 631; Kaufman v. Leonard, 139 Mich. 104, 102 N. W. 632; Reidenbach v. Tuck, 88 N. Y. S. 366; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143n; Steinman v. Wilkins, 7 Watts and S. (Pa.) 466, 42 Am. Dec. 254.

[53] Hall v. Pillsbury, 43 Minn. 33, 44 N. W. 673, 7 L. R. A. 529, 19 Am. St. 209; Dolliff v. Robbins, 83 Minn. 498, 86 N. W. 772, 85 Am. St. 466.

[54] McCurdy v. Wallblom Furniture &c. Co., 94 Minn. 326, 102 N. W. 873, 3 Am. & Eng. Ann. Cas. 468.

warehousemen for goods held, before transit is commenced, or after transit is finished, will be considered in the treatment of carriers.[55]

§ 102. **Redelivery—Presumption in case of injury to goods—Termination of relation.**—The warehouseman is under the general duty to redeliver the goods stored to the bailor, or to the holder of the properly indorsed receipt,[56] and it has been held that he cannot require proof that the bailor is the owner.[57] There is an exception to the general rule that the identical goods stored must be returned, where wheat is stored with an elevator-man, and mixed with other wheat, in which case the obligation is to return a like amount of wheat of the same kind and quality, or where wheat is stored to be returned in flour, not necessarily from the same wheat.[58] Since the warehouseman is liable only for negligence, or the failure to use ordinary care, the burden of proof is at all times on the plaintiff who charges him with such failure, but when he has shown the delivery of the goods, and that they were not redelivered or were injured, he has made out a prima facie case.[59] But the warehouseman has made out his defense when he shows that the loss was from a cause for which he is excused, as an act of God, and he cannot then be held liable unless the plaintiff shows that the negligence of the warehouseman was a

[55] See subject of Carriers, §§ 131, 239, 240, infra.

[56] Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209; Babcock v. People's Sav. Bank, 118 Ind. 212, 20 N. E. 732; Lichtenhein v. Boston &c. R. Co., 11 Cush. (Mass.) 70; Bank of Oswego v. Doyle, 91 N. Y. 32, 43 Am. Rep. 634; Velsian v. Lewis, 15 Ore. 539, 3 Am. St. 184; Harris v. Bradley, 2 Dill. (U. S.) 284, Fed. Cas. No. 6116. See Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112, 20 Atl. 203, 9 L. R. A. 260, as to liability of warehouseman who surrenders goods without production of receipt, when contract was to deliver only on surrender.

[57] McCafferty v. Brady, 5 Sad. (Pa.) 565 (unof.), 9 Atl. 37, 19 Wkly. Notes Cas. 553.

[58] Yockey v. Smith, 181 Ill. 564, 72 Am. St. 286; Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211; Drudge v. Leiter, 18 Ind. App. 694, 49 N. E. 34, 63 Am. St. 359; Hall v. Pillsbury, 43 Minn. 33, 19 Am. St. 209; Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Hutchinson v. Commonwealth, 82 Pa. St. 572; Bretz v. Diehl, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. 706. See cases cited in § 23, supra.

[59] Parry v. Squair, 79 Ill. App. 324; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Lynch v. Kluber, 20 Misc. (N. Y.) 601, 46 N. Y. S. 428; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143n.

contributing cause of the loss.[60] The relationship is terminated by redelivery, and it is held that when grain reaches the spout in the control of the bailee or his agent, carrying it from the elevator, the relationship is ended.[61] The warehouseman is liable in trover for misdelivery.[62]

§ 103. **Wharfingers.**—Wharfingers maintain wharves for the purpose of receiving goods for hire, either from shippers who desire to forward them by vessels, or from the vessel upon discharge of its cargo. The duties of a wharfinger are practically the same as those of a warehouseman. He is held to ordinary diligence in caring for the goods.[63] His liability begins when the goods are delivered to him or upon his wharf, and he has notice of such delivery,[64] and ends when he ceases to have control of the property, and has delivered it to the person for whom it was intended.[65] Usage may very largely enter into the obligation of the wharfinger,[66] and, in the absence of contract, his compensation is determined by the customary charge, if reasonable.[67]

§ 104. **Factors and commission merchants.**—Factors or commission merchants are those who make it a business to receive the goods of others and sell them upon commission. Though they are to a certain extent the agents of the owner, yet they are

[60] Taussig v. Bode, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774; Hunter v. Ricke Bros., 127 Iowa 108, 102 N. W. 826; Marks v. New Orleans Cold Storage Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271, 90 Am. St. 285; Knights v. Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. 375; Shropshire v. Sidebottom, 30 Mont. 406, 76 Pac. 941; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467. See cases cited in notes, 1 Am. & Eng. Ann. Cas. 23. See Milwaukee Mirror &c. Co. v. Chicago &c. R. Co., 148 Wis. 173, 134 N. W. 379.

[61] De Mott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; The R. G. Winslow, 4 Biss. (U. S.) 13.

[62] Alabama & T. R. Co. v. Kidd, 35 Ala. 209; Jeffersonville R. Co. v. White, 6 Bush (Ky.) 251; Lichtenhein v. Boston & P. R. Co., 11 Cush. (Mass.) 70; Bank of Oswego v. Doyle, 91 N. Y. 32, 43 Am. Rep. 634; Collins v. Burns, 63 N. Y. 1.

[63] Cox v. O'Rily, 4 Ind. 368, 58 Am. Dec. 633; Garfield &c. Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60, 67 N. E. 863, 61 L. R. A. 946, 100 Am. St. 543; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143; Barber v. Abendroth, 102 N. Y. 406, 55 Am. Rep. 821; Blin v. Mayo, 10 Vt. 56, 33 Am. Dec. 175.

[64] Packard v. Getman, 6 Cowen (N. Y.) 757, 16 Am. Dec. 475; Blin v. Mayo, 10 Vt. 56, 33 Am. Dec. 175.

[65] Cobban v. Downe, 5 Esp. 41.

[66] Cobban v. Downe, 5 Esp. 41; Blin v. Mayo, 10 Vt. 56, 33 Am. Dec. 175.

[67] Riddick v. Dunn, 145 N. Car. 31, 58 S. E. 1091, 13 Am. & Eng. Ann. Cas. 382, and cases cited in note.

bailees, since they have the possession of the goods, and they are held to use the diligence of warehousemen in caring for the goods.[68] The factor is also under the obligation to use the skill of the ordinary factor in carrying out the purposes of the bailment, and it is not enough that he has exercised good faith.[69] The factor is a bailee who has, contrary to the general rule, a general lien on the goods in his possession to secure a balance of account extending over more than one transaction,[70] which he loses by surrender of possession.[71] He is held to the duty to strictly follow the directions of the employer,[72] and as a general rule cannot pledge or pawn the goods, or substitute other goods for them.[73]

§ 105. **Safe-deposit companies.**—Safe-deposit companies are those which undertake in the usual course of business to furnish for hire a box or safe in a burglar-proof vault, in which valuable papers may be kept. The company, though it watches over the vault in which the boxes are kept, has not full control over the property, for the depositor or his agent places property in the box or removes it when he pleases. There is in fact no delivery to the company, and the best authority holds that the relation thus created is not a bailment, but is rather in the nature of the lease of space, creating a landlord and tenant relation.[74] Yet the courts have many times called the relation a bailment relation.[75] Whatever the relation, it is settled that the deposit

[68] Van Zile Bailments (2d ed.), § 193; Goddard Bailments, § 157; Jones Bailments, § 98 et seq.; Story Bailments (9th ed.), § 456; Coggs v. Bernard, 2 Ld. Raym. 909; McKenzie v. Nevius, 22 Maine 138, 38 Am. Dec. 291; Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516.

[69] Story Bailments (9th ed.), § 395; Weaver v. Poyer, 70 Ill. 567; Dunbar v. Gregg, 44 Ill. App. 527.

[70] Comer v. Way, 107 Ala. 300, 19 So. 966, 54 Am. St. 93; Balderston v. Nat. Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. 772. But see First Nat. Bank v. Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. 431.

[71] Rowland v. Dolby, 100 Md. 272, 59 Atl. 666, 3 Am. & Eng. Ann. Cas. 643.

[72] Comer v. Way, 107 Ala. 300, 19 So. 966, 54 Am. St. 93; McKenzie v. Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. 209; B. F. Sturtevant Co. v. Dugan, 106 Md. 587, 14 Am. & Eng. Ann. Cas. 675.

[73] Commercial Bank v. Hurt, 99 Ala. 130, 12 So. 568, 19 L. R. A. 701, 42 Am. St. 38. The subject of factors and commission merchants is more fully considered under the title Agency.

[74] 2 Street Found. Leg. Liab. 291, ch. 28; Van Zile Bailments (2d ed.), §§ 195, 196. Hale Bailments, p. 248-9. See Gregg v. Hilson, 8 Phila. (Pa.) 91.

[75] Cussen v. Southern Cal. Sav. Bank, 139 Cal. 534, 65 Pac. 1099, 85 Am. St. 221; Mayer

company is held to ordinary care, or diligence commensurate with the needs for care and the circumstances, which, in such cases, because of the value of the property, is a high degree of care and watchfulness.[76] This has been defined as the care and diligence ordinarily exercised by keepers of safe-deposit vaults under like circumstances and surroundings.[77] It seems that the statement of Mr. Hale that safe-deposit companies assume, by express contract, certain duties, which, in the absence of express contract, are imposed upon bailees by law, is in fact the solution of the difficulty, for it was not necessary in any of the cases to hold the safe-depositary as a bailee in order to charge it with the liability.[78]

§ 106. **Public officers as bailees.**—Public officers who have charge of public funds would seem in reality to be bailees under special obligations, since they have possession under the duty to keep for another, and have no right to use the funds.[79] But in most cases, the American courts have held the custodian of public funds absolutely liable as an insurer, though the reason for this may often be found in legislative provision or in the wording of the bond which the officer gives,[80] and many cases hold that they are not bailees, but debtors.[81]

v. Brensinger, 180 Ill. 110, 54 N. E. 159 and note, 72 Am. St. 196n; Jones v. Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438, 20 Am. St. 718; Lockwood v. Manhattan Storage & Warehouse Co., 28 App. Div. (N. Y.) 68, 50 N. Y. S. 974; Safe Deposit Co. v. Pollock, 85 Pa. St. 391, 27 Am. Rep. 660. For a recent case holding a safe deposit company a bailee and a discussion of the rights of the lessee and lessor, see National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B. 431 and note.

[76] See cases cited in note 75.

[77] Van Zile Bailments (2d ed.), § 196, citing Ray v. Bank of Kentucky, 10 Bush (Ky.) 344; Ouderkirk v. Cent. Nat. Bank, 119 N. Y. 263, 23 N. E. 875; First Nat. Bank v. Zent, 39 Ohio St. 105, 4 Ky. L. 1013.

[78] Hale Bailments, p. 250.

[79] 2 Street Found. Leg. Liab., p. 292, ch. 28; Wilson v. People, 19 Colo. 199, 34 Pac. 944, 22 L. R. A. 449n, 41 Am. St. 243; United States v. Thomas, 15 Wall. (U. S.) 347, 21 L. ed. 93.

[80] United States v. Zabriskie, 87 Fed. 714; Ramsay's Estate v. People, 197 Ill. 574, 64 N. E. 555; Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; Tillinghast v. Merrill, 151 N. Y. 135, 45 N. E. 1152, 56 Am. St. 612; Smythe v. United States, 188 U. S. 156, 47 L. ed. 427; United States v. Prescott, 3 How. (U. S.) 578, 11 L. ed. 734.

[81] Adams v. Lee, 72 Miss. 281, 16 So. 243; United States v. Prescott, 3 How. (U. S.) 578, 11 L. ed. 734; Town of Cameron v. Hicks, 65 W. Va. 484, 64 S. E. 832.

§ 107. **Other bailments for custody—Agisters and livery stable keepers.**—An agister is one who takes cattle or stock of another into his own grounds, to be fed or pastured for hire. His rights and liabilities are practically the same as those of any other bailee for hire, except that at common law he had no lien.[82] He is held under the duty to keep his pasture properly enclosed,[83] and it may be negligence to leave open gates, so that stock may stray away or be stolen, and the agister becomes liable for the loss.[84] It may also be negligence to expose animals to danger from the viciousness of other animals.[85] The livery stable keeper who takes charge of a horse or a carriage for hire is not an insurer of its safety, and is bound to use only ordinary care.[86] This rule has been applied in cases where a horse was tied in the ordinary and customary manner, as the owner had tied it or had seen it tied, and the horse got loose and was injured or escaped.[87] Officers who hold in custody property taken upon writs of execution or attachments may be in some instances held to the obligations of the bailee for hire,[88] and such is the case where an officer performs his duty for recompense, or where the finder of lost property has sought it for a reward.[89]

[82] See § 94 supra.

[83] Cecil v. Preuch, 4 Mart. (N. S.) (La.) 256, 16 Am. Dec. 171.

[84] Story Bailments (9th ed.), § 443; Jones Bailments, § 92; Swann v. Brown, 6 Jones (N. Car.) 150.

[85] Smith v. Cook, 1 Q. B. D. 79.

[86] Bigger v. Acree, 87 Ark. 318, 112 S. W. 879, 23 L. R. A. (N. S.) 187 and note; Hunter v. Ricke Bros., 127 Iowa 108, 102 N. W. 826; Weick v. Dougherty, 28 Ky. L. 930, 90 S. W. 966, 3 L. R. A. (N. S.) 348 and note; Dennis v. Huyck, 48 Mich. 620, 12 N. W. 878, 42 Am. Rep. 479.

[87] Bigger v. Acree, 87 Ark. 318, 112 S. W. 879, 23 L. R. A. (N. S.) 187 and note; Lockridge v. Fesler, 18 Ky. L. 469, 37 S. W. 65.

[88] Story Bailments, § 620; Blake v. Kimball, 106 Mass. 115; Cross v. Brown, 41 N. H. 283; Aurentz v. Porter, 56 Pa. St. 115; Bobo v. Patton, 6 Heisk. (Tenn.) 172, 19 Am. Rep. 593.

[89] Cummings v. Gann, 52 Pa. St. 484.

CHAPTER VII.

INNKEEPERS AND THE POST-OFFICES.

§ 108. Innkeepers as extraordinary bailees for custody.
109. Who are innkeepers.
110. Who is a guest—Transient character of the relationship.
111. A guest must receive accommodations of the inn as such.
112. Innkeeper's duty to receive all comers.
113. Innkeeper's liability for the goods of his guests.
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116. Innkeper's liability for the safety and protection of his guests.
117. Innkeeper's lien.
118. Termination of relation.
119. Inkeeper as ordinary bailee.
120. The post-office department as bailee.

§ 108. Innkeepers as extraordinary bailees for custody.—The bailment relationship which we are now about to consider is that of the innkeeper as the bailee for hire of the goods of his guest. The characteristic of this relationship which causes it to be classified as extraordinary bailment is the liability to which the bailee is held, since the innkeeper is held by the common law to be the insurer of the safety of the goods and chattels of the traveler, his guest, for reasons of public policy originating in mediæval times. Then travel was more dangerous than now; there might be collusion between the innkeeper and thieves or robbers, and further, the traveler remains in one place but a short time, and if he had to go to the trouble of proving the innkeeper's negligence, he would be liable to lose all his rights. Therefore it is just that he should be protected by a strict rule.[1] Yet this strict liability is fastened by the law upon only certain individuals who hold out accommodations to the public, and upon them only in regard to transient guests, and not as to those who make the inn or

[1] Street on Found. Leg. Liab., vol. 2, ch. 29, p. 294; Goddard Bailments, § 161; Van Zile Bailments (2d ed.), § 329. For history of inns see Cromwell v. Stephens, 3 Abb. Prac. (N. S.) (N. Y.) 26, 2 Daly (N. Y.) 15; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405.

hotel or lodging-house their home, so that it becomes important to determine who is an innkeeper, and who is his guest, to ascertain where liability exists. Some eminent authorities have even gone so far as to doubt that the innkeeper is really a bailee, since the guest and not the innkeeper is the one who frequently has the actual possession of the former's goods.[2] But the liability of the innkeeper has always been considered by text-writers as a part of the law of bailments.

§ 109. **Who are innkeepers.**—Judge Cooley defined an innkeeper as "one who holds himself out to the public as ready to accommodate all comers with the conveniences usually supplied to travelers on their journeys."[3] In an English leading case it was said that "An inn is a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received."[4] In an American leading case the court held an innkeeper to be "one who holds himself out to the public as engaged in the business of keeping a house for the lodging and entertainment of travelers and passengers, their horses and attendants, for reasonable compensation."[5] It is not necessary that all the conveniences usually supplied to travelers should be supplied by a person in order to render him liable as an innkeeper. The proprietor of a house which furnishes lodging only to a traveler, and not food, as in the instance of a "European plan" hotel, is an innkeeper.[6] The mere furnishing of meals, as by a restaurant or cafékeeper, does not make him liable as an innkeeper even though he may elsewhere on his premises be engaged as an innkeeper.[7]

[2] Street Found. Leg. Liab., vol. 2, ch. 29.

[3] 2 Cooley Torts (3d ed.), § 1338.

[4] Thompson v. Lacy, 3 B. & Ald. 283.

[5] Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

[6] Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Nelson v. Johnson, 104 Minn. 440, 116 N. W. 828, 17 L. R. A. (N. S.) 1259 and note; Krohn v. Sweeney, 2 Daly (N. Y.) 200; Johnson v. Chadbourne Fin. Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. 571n; Wintermute v. Clarke, 5 Sandf. (N. Y.) 243; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

[7] Lewis v. Hitchcock, 10 Fed. 4; Bonner v. Welborn, 7 Ga. 296; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Willard v. Reinhardt, 2 E. D. Smith (N. Y.) 148; Carpenter v. Taylor, 1 Hilt. (N. Y.) 193. The Civil Rights Bill, 1 Hughes (U. S.) 541.

One who entertains travelers occasionally is not an innkeeper, for there must be a holding out to the public, and to some extent a regular business of accommodating travelers for hire, so ordinarily a farmer who entertains a traveler is not an innkeeper.[8] One may be an innkeeper, however, and not at all times be open to the public, as in the case of the proprietor of a summer hotel.[9] The distinction between boarding-house and lodging-house keepers and innkeepers is that the former do not hold themselves out as accommodating transients,[10] and do not accommodate the public, but receive only those whom they choose.[11] An establishment may be an inn as to transient guests, but the proprietor may hold the relationship of boarding-house or lodging-house keeper to those persons who make it their home or reside there under special contracts.[12] And as an innkeeper may not be liable to all inmates of his house as an insurer, so a boarding-house keeper may occasionally entertain transients without being liable to them as an innkeeper.[13] The true test of an innkeeper is the holding out to the public to receive, for compensation, all transients who come in a proper condition.[14] By the weight of authority a sleeping-car company is not held to be an innkeeper,[15] some authorities giving as a

[8] Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Lyon v. Smith, Morris (Iowa) 184; Cady v. McDowell, 1 Lans. (N. Y.) 484; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

[9] Hale Bailments, p. 260; Holstein v. Phillips, 146 N. Car. 366, 59 S. E. 1037, 14 L. R. A. (N. S.) 475, 14 Am. & Eng. Ann. Cas. 323.

[10] Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. 198; Davis v. Gay, 141 Mass. 531, 6 N. E. 549.

[11] Dansey v. Richardson, 3 El. & Bl. 144; Queen v. Rymer, 2 Q. B. Div. 136; Birmingham R. &c. Co. v. Drennen (Ala.), 57 So. 876; Cady v. McDowell, 1 Lans. (N. Y.) 484; Cromwell v. Stephens, 3 Abb. Pr. (N. S.) (N. Y.) 26, 2 Daly (N. Y.) 15. See Quigley v. Southwick, 135 N. Y. S. 565.

[12] Pollock v. Landis, 36 Iowa 651; Johnson v. Reynolds, 3 Kans. 257; Vance v. Throckmorton, 5 Bush. (Ky.) 41, 96 Am. Dec. 327; Hall v. Pike, 100 Mass. 495; Wiser v. Chesley, 53 Mo. 547; Cross v. Wilkins, 43 N. H. 332; Cromwell v. Stephens, 3 Abb. Pr. (N. S.) (N. Y.) 26, 2 Daly (N. Y.) 15; Seward v. Seymour, Anthon Law Stud. 51.

[13] Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

[14] Goddard Bailments, § 169; Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. 198; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209; Houser v. Tully, 62 Pa. St. 92, 1 Am. Rep. 390; Van Zile Bailments (2d ed.), § 331.

[15] Pullman Palace-Car Co. v. Smith 73 Ill. 360, 24 Am. Rep. 258; Lewis v.

ground that the sleeping-car company does not undertake to accommodate the public, but only a certain class, those who have first-class tickets,[16] and it is said that the traveler is not obliged to put his goods into the custody of the sleeping-car, but may remain in the ordinary car.[17] However, there seems to be little in this distinction, and as said by Mr. Goddard, every reason for not considering them as innkeepers save one has been effectually refuted, and that one "is that the 'peculiar liability of the innkeeper is one of great rigor and should not be extended beyond its proper limits.' The difference between the European hotel and the modern compartment sleeper is that one is stationary, the other on wheels; but one is an inn, the other is not."[18] It is generally held that a steamboat proprietor is not an innkeeper as to its guests who have staterooms, for as it is a common carrier, it cannot be subject to both liabilities at the same time for the same property.[19]

§ 110. Who is a guest—Transient character of the relationship.—The innkeeper is held under an extraordinary liability only to those persons who are his guests, and not to every one who comes under his roof. Perhaps the most satisfactory definition of guest is that of Mr. Hale, "A transient who patronizes an inn as such, and receives accommodations with the consent of the innkeeper, is a guest."[20] It is to a certain extent hard to determine just who falls within the classification as a transient. The courts have defined the transient as a traveler, a wayfarer, a temporary lodger, a stranger, a temporary sojourner whose stay is precarious or uncertain,[21] any one away from home receiv-

New York Cent. Sleeping-Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Woodruff Sleeping & Parlor Car Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Blum v. Southern Pullman Co., 1 Flip. (U. S.) 500; Pullman Palace-Car Co. v. Lowe, 28 Nebr. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. 325.

[16] Welch v. Pullman Palace-Car Co., 16 Abb. Pr. (N. S.) (N. Y.) 352.

[17] Hale Bailments, p. 263.

[18] Goddard Bailments, § 166.

[19] Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456. Compare Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. 616.

[20] Hale Bailments, § 49. See Goddard Bailments, § 170; Walling v. Potter, 35 Conn. 183; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

[21] Fay v. Pac. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. 198; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec.

ing accommodations at an inn as a traveler.[22] One who lives permanently in a hotel, or makes it his residence, is a boarder or lodger, and not a transient guest.[23] It is not necessary that one should have come from a distance to be a guest, but a townsman or a neighbor may be a traveler and a guest.[24] "Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or per week, deprives him of his character as a traveler and a guest, provided that he retains his status as a traveler in other respects,"[25] and has been received and entertained as such by the innkeeper. Usually those who receive special contract rates are boarders, and an inhabitant of any place who makes a special contract with an innkeeper for board or lodgings is not a guest,[26] but a traveler does not lose his rights as a guest by inquiring in advance as to charges, or receiving special rates.[27] The distinction between guests and lodgers or boarders consists in the impermanent and transitory character of the former relation, and is not dependent on the length of stay, or the contract for payment,[28] though it has been held that one is a boarder who contracts for a definite stay of two or three weeks at reduced rates.[29] In one case, where the wife and children of the plaintiff were residents of a city and remained part of the time at a hotel, and the plaintiff, who was a

657; Russell v. Fagan, 7 Houst. (Del.) 389, 8 Atl. 258; Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762.

[22] Pullman Palace-Car Co. v. Lowe, 28 Nebr. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. 325.

[23] Moore v. Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. 265; Horner v. Harvey, 3 Gild. (N. Mex.) 307, 5 Pac. 329; Lawrence v. Howard, 1 Utah 142.

[24] Walling v. Potter, 35 Conn. 183; Hilton v. Adams, 71 Maine 19; Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

[25] Norcross v. Norcross, 53 Maine 163; Jalie v. Cardinal, 35 Wis. 128; Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242; Hall v. Pike, 100 Mass. 495; Ross v. Mellin, 36 Minn. 421, 32 N. W. 172.

[26] Shoecraft v. Bailey, 25 Iowa 553; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Berkshire Woolen Co. v. Proctor, 7 Cush. (Mass.) 417; Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762.

[27] See cases cited in note 25; Bennet v. Mellor, 5 T. R. 273; Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. 198; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Holstein v. Phillips, 146 N. Car. 366, 59 S. E. 1037, 14 L. R. A. (N. S.) 475, 14 Am. & Eng. Ann. Cas. 323.

[28] See cases cited in notes 25 and 27; Johnson v. Reynolds, 3 Kans. 257; Vance v. Throckmorton, 5 Bush (Ky.) 41, 96 Am. Dec. 327; Hancock v. Rand, 94 N. Y. 1; Clute v. Wiggins, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448.

[29] Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859, 46 L. R. A. 319, 73 Am. St. 886.

resident of another state, came to the hotel and remained there four weeks under a special contract at reduced rates for himself and family, it was held that the plaintiff was a traveler, and a guest of the hotel, but that his family were boarders, and not guests.[30]

§ 111. A guest must receive accommodations of the inn as such.—Not every person who enters an inn is a guest. One must secure some accommodations there to become a guest, procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper, to create such relation.[31] It has been said that it is immaterial how slight the entertainment, or how temporary the use of the inn, if the person is there as a guest.[32] A neighbor or friend who comes at the invitation of the innkeeper is not a guest,[33] nor is one who comes merely to visit a guest of the inn,[34] or merely to take refreshment.[35] But if one in the course of a journey goes to an inn for refreshment, he is a guest.[36] So under certain circumstances the purchase of liquor has been held to make one a guest.[37] One who attends a ball at an inn, at the proprietor's invitation, even though he has supper, stables his horse, and purchases liquor, is not a guest, for he is not a traveler,[38] nor are persons attending a club banquet in the dining-room of a hotel, at the invitation of the club, guests of the inn, even though they had registered and been assigned a room, though this is rather an extreme case.[39] One who put his mule in an inn-stable and intended to take his dinner at the inn, and then left without any agreement with the innkeeper or his authorized agent, and who was prevented from taking the meal as he intend-

[30] Lusk v. Belote, 22 Minn. 468.

[31] Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. 930n and cases cited in note.

[32] Kopper v. Willis, 9 Daly (N. Y.) 460.

[33] Bacon Abr. Inns and Innkeepers, p. 234, ch. 5.

[34] Gastenhofer v. Clair, 10 Daly (N. Y.) 265.

[35] Commonwealth v. Moore, 145 Mass. 244, 13 N. E. 893; Commonwealth v. Hagan, 140 Mass. 289; 3 N. E. 207.

[36] Atkinson v. Sellers, 5 C. B. (N. S.) 442; Bennet v. Mellor, 5 T. R. 273; Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

[37] Bennett v. Mellor, 5 T. R. 273; McDonald v. Edgerton, 5 Barb. (N. Y.) 560; Fitch v. Casler, 17 Hun (N. Y.) 126. See Cake v. District of Columbia, 33 App. (D. C.) 272, 17 Am. & Eng. Ann. Cas. 814.

[38] Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Fitch v. Casler, 17 Hun (N. Y.) 126.

[39] Amey v. Winchester, 68 N. H. 447, 39 Atl. 487, 39 L. R. A. 760, 73 Am. St. 614.

ed by an injury to the mule occurring in the stable, was held not a guest, and the innkeeper was not liable for injuries to the mule.[40] A man and woman who go to a hotel and take rooms for the purpose of engaging in illicit intercourse are not guests.[41] Nor is one a guest who engages a room, but does not occupy it at the time, his object being to leave a package of money with the clerk in a safe place.[42] One who visits an inn and merely leaves goods there, but does not receive accommodations, is not a guest.[43] Those who occupy the rooms of hotels kept on the European plan are guests,[44] and it was held that one was a guest who took a room but only occupied it for the purpose of dressing and shaving, before going to a friend's house, and received no other accommodation than the use of the room for a short time, and some hot water.[45] The innkeeper is not liable as to a guest, nor even as a gratuitous bailee, to one who delivers his goods to the hotel porter at the station, intending to become a guest, but who changes his mind and secures no accommodation there, though the goods are lost.[46] But a traveler who takes food without lodging is a guest.[47] It seems that one who is on a journey and stops at an inn to secure food and stable for his horse is a guest, even though he obtains no accommodations for himself,[48] and that if one intending to become a guest sends his horse in advance, and the innkeeper receives him on that understanding, he is a guest from that time,[49] but one who sends his horse to the inn to be cared for, with no intention of stopping there himself,

[40] Brewer v. Carswell, 132 Ga. 563, 64 S. E. 674, 23 L. R. A. (N. S.) 1107 and note, 131 Am. St. 216.

[41] Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

[42] Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32, 4 N. E. 398, 58 Am. Rep. 785.

[43] Toub v. Schmidt, 60 Hun (N. Y.) 409, 15 N. Y. S. 616. One who sends his baggage to a hotel and goes there, but who does no more than sit and write letters while waiting for his train, is not a guest with respect to his baggage. Baker v. Bailey (Ark.), 145 S. W. 532, 39 L. R. A. (N. S.) 1085.

[44] Bullock v. Adair, 63 Ill. App. 30; Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271.

[45] Lynar v. Mossop, 36 U. C. (Q. B.) 230.

[46] Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. 930n.

[47] Orchard v. Bush, 2 L. R. (1898) Q. B. 284, 78 L. T. (N. S.) 557; Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560.

[48] Thickstun v. Howard, 8 Blackf. (Ind.) 535; Russell v. Fagan, 7 Houst. (Del.) 389, 8 Atl. 258; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574.

[49] Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

or who uses the stables of the inn as a livery, acquires no rights as a guest.[50]

The general rule is that no one can become a guest without the consent of the innkeeper or his authorized agent,[51] and the relation of guest begins as soon as he is accepted, assent sometimes being implied,[52] as for instance one who goes to an inn, gives his baggage to the servant at the door, and, going into the dining-room, is served with food at the customary price, has been accepted as a guest, though he has not registered, and has not notified any officer of the hotel of his intentions, nor given any directions as to his baggage.[53] A hotel keeper is liable for baggage from the time it is delivered to his porter at the depot, and a check given for it, even though the porter has in fact instructions to receive no baggage.[54] One who patronizes a sea bathing-house kept separately from his inn by an innkeeper is not a guest of the inn.[55]

§ 112. Innkeeper's duty to receive all comers.—The general rule is that the innkeeper is bound to receive and entertain all who apply to him for entertainment and tender the price or are able and willing to pay, unless he has no room in his house,[56] or the person applying is disorderly,[57] or infected with contagious disease,[58] his duty in this respect being very similar to that of a carrier of passengers, and for the same reason, since

[50] Hickman v. Thomas, 16 Ala. 666; Russell v. Fagan, 7 Houst. (Del.) 389, 8 Atl. 258; Thickstun v. Howard, 8 Blackf. (Ind.) 535; Healey v. Gray, 68 Maine 489, 28 Am. Rep. 80; Ingallsbee v. Wood, 33 N. Y. 577; Grinnell v. Cook, 3 Hill (N. Y.) 485; 38 Am. Dec. 663.

[51] Strauss v. County Hotel and Wine Co., 12 Q. B. D. 27; Gastenhofer v. Clair, 10 Daly (N. Y.) 265.

[52] Pinkerton v. Woodward, 33 Cal. 557; 91 Am. Dec. 657; Gastenhofer v. Clair, 10 Daly (N. Y.) 265; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574.

[53] Memphis Hotel Co. v. Hill (Tenn.), 136 S. W. 997, 34 L. R. A. (N. S.) 420 and note.

[54] Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. 333.

[55] Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 115 Am. St. 114; 6 L. R. A. (N. S.) 828n.

[56] Goddard Bailments, §§ 175-6; Rex v. Ivens, 7 Car. & P. 213; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209; State v. Steele, 106 N. Car. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. 573.

[57] 1 Hawk. P. C., ch. 78, § 1; Thompson v. Lacy, 3 B. & Ald. 283; Rex v. Ivens, 7 Car. & P. 213; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209; Commonwealth v. Mitchel, 2 Pars. Eq. Cas. (Pa.) 431.

[58] See Van Zile Bailments (2d ed.), § 344; Gilbert v. Hoffman, 66 Iowa 205, 23 N. W. 632, 55 Am. Dec. 263.

both occupations are affected with a public interest, the one carrying travelers, the other entertaining them at places where they must stop. He is not bound to admit one who is not able to pay,[59] and of course no one has a right to enter for an unlawful purpose, as to commit an assault upon a guest.[60] It is the general rule that he must admit all who come to do business with his guests,[61] and especially is this true when the guest has sent for some one to see him on business.[62] On the other hand, he may exclude one whose business would injure him,[63] and he may exclude loafers, hack-agents, solicitors and similar persons by his regulations.[64] When he has offered a guest reasonable and proper accommodations, he has fulfilled his duty in that respect,[65] and he is not bound to furnish one the precise room he asks for.[66] He must receive the traveler's goods with him, and, if he has a stable, must care for his horse.[67] The innkeeper is subject to an action for an improper refusal to receive a person as a guest.[68]

§ 113. Innkeeper's liability for the goods of his guests.—Practically all authorities are agreed that the innkeeper's liability for the goods of his guest is an extraordinary one, but they do not agree as to the extent of such liability. Three distinct rules are followed, and these have been summed up as follows:[69] First, "that the innkeeper is prima facie liable for the loss of goods in his charge; but may discharge himself by showing that the goods were not lost by his negligence or default;[70] second,

[59] Thompson v. Lacy, 3 B. & Ald. 283; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Watson v. Cross, 2 Duv. (Ky.) 145; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

[60] Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209.

[61] State v. Steele, 106 N. Car. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. 573; Commonwealth v. Mitchel, 2 Pars. Eq. Cas. (Pa.) 431.

[62] Hale Bailments, p. 276.

[63] State v. Steele, 106 N. Car. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. 573.

[64] State v. Steele, 106 N. Car. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. 573.

[65] Fell v. Knight, 8 M. & W. 269.

[66] Fell v. Knight, 8 M. & W. 269.

[67] Schouler Bailments (3d ed.), § 288, Bac. Abr. "Inns and Innkeepers," p. 232, ch. 3.

[68] Watson v. Cross, 2 Duv. (Ky.) 147; McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. 699.

[69] Sibley v. Aldrich, 33 N. H. 553, 66 Am. Dec. 745. Generally, see note, 99 Am. St. 577.

[70] Story Bailments (9th ed.), § 472; Dawson v. Cholmeley, D. & M. 348, 5 Q. B. 164; Metcalf v. Hess, 14 Ill. 129; Bowell v. De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. 240; Hill v. Owen, 5 Blackf. (Ind.) 323, 35 Am. Dec. 124; Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859, 46 L. R. A. 319, 73 Am. St. 886;

that the innkeeper is discharged by showing how the accident happened, and that it happened by inevitable accident, or irresistible force, though the accident might not amount to what the law denominates the act of God and the force might not be the power of a public enemy;[71] third, that the innkeeper is liable unless the loss was caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest."[72] The third rule is the common-law rule, applying to the innkeeper the strict liability of the insurer, like the common carrier, and is still followed in most jurisdictions, but the courts in some of the states, finding this rule harsh, have modified it by the adoption of one of the others. The doctrine holding him liable as an insurer rested upon grounds of public policy and originated in the case of Hulett v. Swift,[73] though it was opposed by other decisions almost as early.[74] Proceeding to particular instances, it seems that the majority of cases hold that the innkeeper is not liable for loss by an accidental fire, if his negligence did not contribute thereto,[75] though some decisions hold him to the strict liability in such cases.[76] It has been said that in no instance has an innkeeper been held liable for goods lost by robbery except where he was negligent, but that no reported case can be found which has held an innkeeper not liable, so that the cases cannot be considered to sustain the proposition that an innkeeper would be liable for goods so lost, in the absence of negligence,[77] and it

Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

[71] Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. 571 and note; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574.

[72] Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. 198; Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. 333; Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 742, 8 L. R. A. 97n, 19 Am. St. 686. See cases cited in 99 Am. St. 578.

[73] Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405.

[74] Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574.

[75] Moore v. Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. 265; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127. See Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. 517.

[76] Fay v. Pac. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. (N. S.) 188, 27 Am. St. 198; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405.

[77] Hale Bailments, p. 281; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Woodward v. Birch, 4 Bush (Ky.) 510.

seems that there is no reason for relaxing the insurer's liability in cases where theft is committed from within the hotel, by a servant or admitted guest, though if it were committed by superior power from without, the innkeeper might perhaps be excused.[78] If loss occurs from the inherent nature of the chattel, the innkeeper is not liable,[79] and all authorities agree that he is excused for loss caused by the act of God or the public enemy, or the fault of the guest or his servant.[80]

§ 114. **For what goods innkeeper is liable.**—The innkeeper is generally held liable as such for all goods brought within the inn by his guest,[81] with the exception of goods for sale or show,[82] or goods retained in the exclusive possession of the guest.[83] However, there is a line of authorities which hold him liable only for such goods as are considered as baggage, when traveling.[84] So under the general rule he is liable for any amount of money brought within by a traveler,[85] but under the baggage rule, only for a reasonable amount for his journey.[86] The inn-

[78] Calye's Case, 8 Coke 63; Rockwell v. Proctor, 39 Ga. 105; Spring v. Hager, 145 Mass. 186, 13 N. E. 479, 1 Am. St. 451; Taylor v. Downey, 104 Mich. 532, 62 N. W. 716, 29 L. R. A. 92, 53 Am. St. 472; Gile v. Libby, 36 Barb. (N. Y.) 70; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 742, 8 L. R. A. 97n, 19 Am. St. 686; Walsh v. Porterfield, 87 Pa. St. 376; Cunningham v. Bucky, 42 W. Va. 671, 26 S. E. 442, 35 L. R. A. 850, 57 Am. St. 878.

[79] Metcalf v. Hess, 14 Ill. 129; Howe Mach. Co. v. Pease, 49 Vt. 477.

[80] See Carhart v. Wainman, 114 Ga. 632, 40 S. E. 781, 88 Am. St. 45; Spring v. Hager, 145 Mass. 186, 13 N. E. 479, 1 Am. St. 451; Purvis v. Coleman, 21 N. Y. 111; Houser v. Tully, 62 Pa. St. 92, 1 Am. Rep. 390; Walsh v. Porterfield, 87 Pa. St. 376; Jalie v. Cardinal, 35 Wis. 118.

[81] Towson v. Havre-de-Grace Bank, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Rubenstein v. Cruikshanks, 54 Mich. 199, 19 N. W. 954, 52 Am. Rep. 806; Kellogg v. Sweeney, 1 Lans. (N. Y.) 397, modified 46 N. Y. 291, 7 Am. Rep. 333; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; McDaniels v. Robinson, 28 Vt. 387, 67 Am. Dec. 720.

[82] Story Bailments (9th ed.), § 476; Williams v. Norvell Shapleigh Hardware Co., 29 Okla. 331, 116 Pac. 786, 35 L. R. A. (N. S.) 350 and note; Fisher v. Kelsey, 121 U. S. 383, 30 L. ed. 930, 7 Sup. Ct. 929; Myers v. Cottrill, 5 Biss. (U. S.) 465, Fed. Cas. No. 9985.

[83] Weisenger v. Taylor, 1 Bush (Ky.) 275, 89 Am. Dec. 626; Vance v. Throckmorton, 5 Bush (Ky.) 41, 96 Am. Dec. 327; Packard v. Northcraft's Admr., 2 Metc. (Ky.) 439; Fuller v. Coats, 18 Ohio St. 343.

[84] Sasseen v. Clark, 37 Ga. 242; Vance v. Throckmorton, 5 Bush (Ky.) 41, 96 Am. Dec. 327; Woodworth v. Morse, 18 La. Ann. 156.

[85] Kent v. Shuckard, 2 B. & Ad. 803; Smith v. Wilson, 36 Minn. 334, 31 N. W. 176, 1 Am. St. 669.

[86] Simon v. Miller, 7 La. Ann. 360;

keeper is not liable as such for goods deposited by one who is not a guest,[87] and it is held that the authority of a hotel clerk does not extend to binding the owner of the hotel to such a liability by accepting for deposit the goods of one not a guest.[88] It is not necessary that the goods should have been owned by the guest; it is sufficient that he brought them into the inn.[89] As we have seen, liability may attach before the goods are brought within the inn, and does attach as soon as they are put in the control of the innkeeper's servant or agent, it even having been held that a delivery of a baggage-check to the servant of the innkeeper at the depot or the bellboy in the hotel was a delivery of the goods to the innkeeper, causing liability to attach at that time.[90] Property within the outbuildings of the inn is kept under the same liability as property within the inn itself.[91] Though an innkeeper is excused for the loss of goods in the exclusive custody of the guest, it does not follow necessarily that the guest's retaining his goods on his person,[92] or ordering them placed in his bedroom,[93] or in a certain part of the inn,[94] is such possession as to excuse the innkeeper.

§ 115. **Limitation of liability.**—In some jurisdictions innkeepers are permitted to limit their liability by providing a safe place for the deposit of money and valuables of a guest, and post-

Noble v. Milliken, 74 Maine 225, 43 Am. Rep. 581; Freiber v. Burrows, 27 Md. 130.

[87] Thickstun v. Howard, 8 Blackf. (Ind.) 535; Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762.

[88] For example, one departing from the hotel. Oxford Hotel Co. v. Lind, 47 Colo. 57, 107 Pac. 222, 28 L. R. A. (N. S.) 495 and note; 18 Am. & Eng. Ann. Cas. 983; Booth v. Litchfield, 201 N. Y. 466, 94 N. E. 1078, 35 L. R. A. (N. S.) 710; Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32, 4 N. E. 398, 58 Am. Rep. 785.

[89] Goddard Bailments, § 184; Van Zile Bailments (2d ed.), § 365; Towson v. Havre-de-Grace Bank, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254.

[90] See cases cited in note 54. Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491; Sasseen v. Clark, 37 Ga. 242; Keith v. Atkinson, 48 Colo. 480, 111 Pac. 55, 139 Am. St. 284 (bellboy); Carhart v. Wainman, 114 Ga. 632, 40 S. E. 781, 88 Am. St. 45 (porter).

[91] Burrows v. Trieber, 21 Md. 320, 83 Am. Dec. 590; Albin v. Presby, 8 N. H. 408, 29 Am. Dec. 679; McDonald v. Edgerton, 5 Barb. (N. Y.) 560. But merely tying horses under a shed without notice to the innkeeper or his hostler does not create any liability for their safety. Bradley Livery Co. v. Snook, 66 N. J. L. 654, 50 Atl. 358, 55 L. R. A. 208.

[92] Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. 198; Smith v. Wilson, 36 Minn. 334, 31 N. W. 176, 1 Am. St. 669; Jalie v. Cardinal, 35 Wis. 118.

[93] Packard v. Northcraft's Admr., 2 Metc. (Ky.) 439; Fuller v. Coats, 18 Ohio St. 343.

[94] Fuller v. Coats, 18 Ohio St. 343.

ing notices in certain designated places informing them of the fact.[95] Statutes to this effect must be strictly construed, as being in derogation of the common law, and exactly complied with.[96] It is sometimes held that if the notices have not been posted in accordance with law, actual notice to the guest is not sufficient to excuse the innkeeper,[97] though other cases hold the contrary.[98] Not only must the notice be such as is prescribed by the statute,[99] and posted in the places required by the statute,[1] but it must be strictly construed as embracing only the kinds of property named; so it is held that a watch does not come within the exception of "jewels and ornaments,"[2] nor forks and spoons.[3] It is probable that the innkeeper may by express contract with the guest limit his liability to any extent except for losses caused by his own negligence.[4] Contributory negligence of the guest is a defense to a recovery.[5] It is not necessarily negligence to consent to sleep with a stranger, who later steals the goods of the guest,[6] to fail to inquire for goods for some days,[7] to fail to inform the innkeeper that the baggage contained valuables[8] or to fail to lock

[95] Hale Bailments, § 290. See note to 99 Am. St. 591.

[96] Such a statute does not apply after the guest has begun his departure from the inn and has given his baggage to a porter sent to receive it, and jewels are lost from a handbag. Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576. See Lanier v. Youngblood, 73 Ala. 587; Olsen v. Crossman, 31 Minn. 222, 17 N. W. 375; Briggs v. Todd, 28 Misc. 208, 59 N. Y. S. 23; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 742, 8 L. R. A. 97n, 19 Am. St. 686.

[97] Purvis v. Coleman, 14 Sup. Ct. (N. Y.) 321, affd. 21 N. Y. 111; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 472, 8 L. R. A. 97n, 19 Am. St. 686.

[98] Olson v. Crossman, 31 Minn. 222, 17 N. W. 375; Batterson v. Vogel, 8 Mo. App. 24.

[99] Spice v. Bacon, 46 L. J. Ex. 713, 36 L. T. 896; Porter v. Gilkey, 57 Mo. 235.

[1] Lanier v. Youngblood, 73 Ala. 587; Beale v. Posey, 72 Ala. 323.

[2] Weadock v. Swart, 163 Mich. 602, 128 N. W. 734, Ann. Cas. 1912A. 959; Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271; Becker v. Warner, 90 Hun (N. Y.) 187, 70 N. Y. St. 535, 35 N. Y. S. 739; Briggs v. Todd, 28 Misc. (N. Y.) 208, 59 N. Y. S. 23; Ramaley v. Leland, 29 N. Y. Super. Ct. 358, modified 43 N. Y. 539, 3 Am. Rep. 728; Rains v. Maxwell House Co., 112 Tenn. 219, 79 S. W. 114, 64 L. R. A. 470.

[3] Briggs v. Todd, 28 Misc. (N. Y.) 208, 59 N. Y. S. 23.

[4] Schouler Bailments (3d ed.), § 309.

[5] Lanier v. Youngblood, 73 Ala. 587; Fowler v. Dorlon, 24 Barb. (N. Y.) 384; Elcox v. Hill, 98 U. S. 218, 25 L. ed. 103; Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560.

[6] Olson v. Crossman, 31 Minn. 222, 17 N. W. 375.

[7] Eden v. Drey, 75 Ill. App. 102.

[8] Bowell v. De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. 240; Shoecraft v. Bailey, 25 Iowa 553; Baehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. 444.

the door of the room.[9] Neither is negligence to be imputed from the fact that the guest is engaged in illegal acts,[10] but intoxication may constitute contributory negligence.[11]

§ 116. **Innkeeper's liability for the safety and protection of his guests.**—By the implied contract between the innkeeper and his guest, the former undertakes more than to furnish him with suitable food and lodging, and there is a further implied undertaking that the guest shall be treated with due consideration for his safety and comfort.[12] The general rule is that the innkeeper must use reasonable care to fulfil this obligation, and is liable only for negligence.[13] A few cases hold him to the same care as a carrier of passengers,[14] but it is said that since the performance of the contract of entertainment is not the chief occupation of the parties, as the performance of the contract is in the case of carriers, and since the guest does not surrender the control of his person to the innkeeper to such an extent as the passenger, and since the servants of the carrier are acting constantly within the course of their employment while performing the contract, while the servants of the innkeeper may be present in the hotel and yet not acting within the scope or course of their employment,—for these reasons the innkeeper should not be held to so high a degree of liability for the acts of his servants as the carrier, as an insurer of the safety of the guests, and is not liable for the acts of servants without the scope or course

[9] Murchison v. Sergent, 69 Ga. 206, 47 Am. Rep. 754; Spring v. Hager, 145 Mass. 186, 1 Am. St. 451; Classen v. Leopold, 32 N. Y. Super. Ct. 705; Cunninham v. Bucky, 42 W. Va. 671, 26 S. E. 442, 35 L. R. A. 850, 57 Am. St. 878.

[10] Cohen v. Manuel, 91 Maine 274, 39 Atl. 1030, 40 L. R. A. 491, 64 Am. St. 225; Cox v. Cook, 14 Allen (Mass.) 165. Compare Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

[11] Becker v. Warner, 90 Hun (N. Y.) 187, 70 N. Y. St. 535, 35 N. Y. S. 739; Walsh v. Porterfield, 187 Pa. St. 376; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 742, 8 L. R. A. 97n, 19 Am. St. 686. See Rubenstein v. Cruikshanks, 54 Mich. 199, 19 N. W. 954, 52 Am. Rep. 806, and Cunningham v. Bucky, 42 W. Va. 671, 26 S. E. 442, 35 L. R. A. 850, 57 Am. St. 878.

[12] Clancy v. Barker, 71 Nebr. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am St. 559; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. 969.

[13] Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. 483; Gilbert v. Hoffman, 66 Iowa 205, 23 N. W. 632, 55 Am. Rep. 263; Weeks v. McNulty, 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. 693.

[14] Clancy v. Barker, 71 Nebr. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. 559.

of their employment, if reasonable care has been exercised.[15] The innkeeper must use ordinary care to keep his premises in a condition safe for the guest who is using them in the ordinary manner, but this liability does not extend beyond the places into which guests may be reasonably supposed to be likely to go in a reasonable belief that they are entitled or invited to do so.[16] So he is liable for injury caused by a defective elevator, or for negligently unskilful management of the same.[17] He must furnish ordinarily safe furniture.[18] He has, at reasonable times and for proper purposes, the right of access to and control over all parts of his property, but this right must be exercised in accord with the rights of the guests, and he has no right to force an entrance into the room of a female when she is in scant attire.[19] He may change a guest's apartment under certain conditions, but if he does, he must provide him a proper apartment, or be liable in damages.[20] If he expels one from his inn, he must use care in so doing and is liable for damages where a sick man is expelled into a storm of ice and snow, from the effects of which he dies.[21]

§ 117. **Innkeeper's lien.**—Since the innkeeper is under an extraordinary liability, the law has given to him the extraordinary privilege of a lien upon the baggage or goods of the guest brought by him to the inn, as security for the amount due the innkeeper for board, lodging and entertainment.[22] This lien ex-

[15] Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. 154; Clancy v. Barker, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653.

[16] Sandys v. Florence, 47 L. J. C. P. 598; Axford v. Prior, 14 W. R. 611; Walker v. Midland R. Co., 55 L. T. (N. S.) 489; Ten Broeck v. Wells, 47 Fed. 690; Stanley v. Bircher, 78 Mo. 245; Patrick v. Springs, 154 N. Car. 270, 70 S. E. 395, Ann. Cas. 1912A. 1209.

[17] Mauzy v. Kinzel, 19 Ill. App. 571, Gordon v. Cummings, 152 Mass. 513; Scott v Churchill, 157 N. Y. 692; Atkinson v. Abraham, 45 Hun (N. Y.) 238, 10 N. Y. St. 342.

[18] Lyttle v. Denny, 222 Pa. 395, 71 Atl. 841, 128 Am. St. 814.

[19] De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. 969.

[20] Hervey v. Hart, 149 Ala. 604, 42 So. 1013, 9 L. R. A. (N. S.) 213 and note, 123 Am. St. 67.

[21] McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. 699.

[22] See notes 107 Am. St. 864 and 21 L. R. A. 229, and cases cited in following notes. Murray v. Marshall, 9 Colo. 482, 13 Pac. 589; Cook v. Kane, 13 Ore. 482, 11 Pac. 226, 57 Am. Rep. 28; Manning v. Hollenbeck, 27 Wis. 202.

tends to goods exempt from execution,[23] and, it has been held, extends to the goods of a third person brought to the inn by the guest, unless the innkeeper knows that such goods are not the guest's property,[24] especially where the guest holds them as servant, agent, or bailee, or the property is animate, but the rule does not apply to stolen property.[25] The goods, however, must be brought into the inn by the guest,[26] and there is no lien upon the goods of a boarder or lodger.[27] This lien depends upon possession, and is waived by voluntarily parting with possession,[28] or by taking a draft or extending credit,[29] though taking security is not a waiver of a lien.[30] The lien is extinguished by a tender of the amount of charges.[31] At common law the innkeeper's lien carries with it no right of sale, and cannot be enforced save by a judicial action,[32] though in some states he now has a right to sell under statute.[33] The lien is not lost by levying an attachment upon the goods.[34]

§ 118. Termination of relation.—The innkeeper may terminate his relation only for misconduct of the guest,[35] or for

[23] Swan v. Bournes, 47 Iowa 501, 29 Am. Rep. 492; Thorn v. Whitbeck, 11 Misc. (N. Y.) 171, 32 N. Y. S. 1088.

[24] Brown Shoe Co. v. Hunt, 103 Iowa 586, 72 N. W. 765, 39 L. R. A. 291, 64 Am. Rep. 198 (salesman's samples belonging to his employer); Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229 (goods in the possession of a guest under contract of purchase); Horace Waters & Co. v. Gerard, 106 App. Div. (N. Y.) 431, 94 N. Y. S. 702, affd., 189 N. Y. 302, 82 N. E. 143, 24 L. R. A. (N. S.) 958, 121 Am. St. 886; Wertheimer-Swarts Shoe Co v. Hotel Stevens Co., 38 Wash. 409, 80 Pac. 563, 107 Am. St. 864. This depends somewhat on statute. See McClain v. Williams, 11 S. Dak. 227, 76 N. W. 930, 49 L. R. A. 610.

[25] Clark v. Lowell &c. R. Co., 9 Gray (Mass.) 231; Robinson v. Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54; Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Wyckoff v. Southern Hotel Co., 24 Mo. App. 382.

[26] Pollock v. Landis, 36 Iowa 651; Stanwood v. Woodward, 38 Maine 192; Hurst v. Byers, 29 Mo. 469; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

[27] Pollock v. Landis, 36 Iowa 651; Mills v. Shirley, 110 Mass. 158; Hurst v. Byers, 29 Mo. 469; Singer Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229n, 38 Am. St. 568; note 107 Am. St. 872.

[28] Hickman v. Thomas, 16 Ala. 666; Manning v. Hollenbeck, 27 Wis. 202.

[29] Jones v. Thurloc, 8 Mod. 172; Manning v. Hollenbeck, 27 Wis. 202.

[30] Angus v. McLachlan, L. R. 23, Ch. Div. 330; Danforth v. Pratt, 42 Maine 50.

[31] Gordon v. Cox, 7 Car. & P. 172.

[32] Fox v. McGregor, 11 Barb. (N. Y.) 41; Jones v. Pearle, 1 Strange 556; Case v. Fogg, 46 Mo. 44; note 107 Am. St. 871.

[33] See Hale Bailments, p. 297.

[34] Lambert v. Nicklass, 45 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561, 72 Am. St. 828.

[35] Howell v. Jackson, 6 Car. & P. 723; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209; Commonwealth v. Mitchell, 2 Pars. Eq. (Pa.) 431.

his failure to pay reasonable charges.[36] The guest may terminate it at any time, but if he fails to notify the innkeeper, he remains liable for any charges which accrue.[37] A temporary absence does not terminate it,[38] but when he has paid his bill and had his name marked off the register in order to prevent his being held to the liability of a guest, he can no longer hold the innkeeper liable as such for his baggage remaining in the inn.[39] However, the liability of the innkeeper as such does not terminate the instant the guest pays his bill and leaves, but continues until a reasonable time for its removal,[40] or if, in the ordinary course of his business, the innkeeper undertakes to remove it to the station, his liability continues until delivery at such place.[41]

§ 119. **Innkeeper as ordinary bailee.**—The innkeeper is an ordinary bailee as to the goods of his boarders or lodgers,[42] or goods of a guest kept for show or sale,[43] or goods held by him under a lien for his charges.[44] He may be liable as a mere gratuitous bailee for the goods which a guest after departure leaves with him for an unreasonable time,[45] or for goods left in his

[36] Schouler Bailments (3d ed.), § 326; Lawrence v. Howard, 1 Utah 142.

[37] Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423.

[38] Towson v. Havre-de-Grace Bank, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254n; McDonald v. Edgerton, 5 Barb. (N. Y.) 560; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Whitemore v. Haroldson, 2 Lea (Tenn.) 312; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574n, 28 Vt. 387, 67 Am. Dec. 720.

[39] O'Brien v. Vaill, 22 Fla. 627, 1 So. 137, 1 Am. St. 219; Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423.

[40] Clark v. Ball, 34 Colo. 223, 82 Pac. 529, 2 L. R. A. (N. S.) 100, 114 Am. St. 154; Murray v. Marshall, 9 Colo. 482, 13 Pac. 589, 59 Am. Rep. 152; Adams v. Clem, 41 Ga. 65, 5 Am. Rep. 524; Baehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. 444; Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423; Maxwell v. Gerard, 84 Hun (N. Y.) 537, 66 N. Y. St. 323, 32 N. Y. S. 849.

[41] Glenn v. Jackson, 93 Ala. 342, 9 So. 259, 12 L. R. A. 382n; Sasseen v. Clark, 37 Ga. 242; Giles v. Fauntleroy, 13 Md. 126; Dickinson v. Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; Seymour v. Cook, 53 Barb. (N. Y.) 451.

[42] Taylor v. Downey, 104 Mich. 532, 62 N. W. 716, 29 L. R. A. 92n, 53 Am. St. 472. See cases cited in note 23 and 26, § 110; Lawrence v. Howard, 1 Utah 142.

[43] See cases cited in note 82.

[44] Murray v. Marshall, 9 Colo. 482, 13 Pac. 589; Giles v. Fauntleroy, 13 Md. 126; Murray v. Clarke, 2 Daly (N. Y.) 102. See Wear v. Gleason, 52 Ark. 364, 20 Am. St. 186.

[45] O'Brien v. Vaill, 22 Fla. 627, 1 So. 137, 1 Am. St. 219; Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423; Whitemore v. Haroldson, 2 Lea (Tenn.) 312; Baker v. Bailey (Ark.) 145 S. W. 532, 39 L. R. A. (N. S.) 1085.

charge by one who does not become a guest, and makes no agreement as to compensation.[46]

§ 120. **The post-office department as bailee.**—The carrying of the mail is recognized by the law as one of the exceptional bailments. In this country, the federal government, through the post-office department and its instrumentalities and agencies, carries the mail. Were this service undertaken by a common carrier, or an ordinary bailee for hire, there is no doubt that the ordinary principles of bailments would apply to their undertaking. But in this country private persons are forbidden to carry mail regularly over post-routes established by the government in order to prevent competition with the government.[47] Since the post-office department is a department of the government, it cannot be sued without its consent, and, therefore, while it is in a way responsible for the proper carrying of the mail, it is not liable to the one who entrusts mail to its care, and generally any negligence or failure of performance of duty on the part of the agents of the department can be corrected only by action of the department itself, and is not subject to review by the courts.[48] Postmasters and their clerks and assistants are public officers, responsible to the government and liable to it upon their bonds for failure in duty. At the same time they are liable to the person who sends or who is entitled to receive mail through their offices. The mailing, receiving and delivering of the mail is a business of the highest importance to the individual, and the agents of the government employed in this work owe a duty to the government and the public to use ordinary and reasonable diligence in accomplishing the purposes of the mail services. So it is the rule that whenever one can trace a loss or breach of duty resulting in loss to the actions in respect to receiving, forwarding or delivering mail of a single officer, postmaster, clerk, assistant,

[46] Stewart v. Head, 70 Ga. 449; Wiser v. Chesley, 53 Mo. 547; Lawrence v. Howard, 1 Utah 142. See note 12 L. R. A. 383. See for liability as to forwarding packages, Baehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. 444.

[47] U. S. Rev. Stat., §§ 389-391; United States v. Bromley, 12 How. (U. S.) 88; Blackham v. Gresham, 16 Fed. 609; United States v. Easson, 18 Fed. 590, 21 Blatchf. (U. S.) 354.

[48] Schouler Bailments (3d ed.), § 269; Hale Bailments, § 100; Van Zile Bailments (2d ed.), § 388.

or other person commissioned by the government mail service, the individual guilty of the negligence or breach is liable in damages to the one suffering loss. But this liability is for his personal acts alone, and he cannot be held for the acts of any other person in the service, even if selected by him, and under his orders,[49] unless he was negligent in his selection.[50] If, however, he employs a private person to do his work, paying him from his own means, the officer in the government service is liable for the acts of such agent.[51] It has been held that it is not necessary to prove particular negligence in relation to the letter or package lost, and that the loss was the direct consequence of that particular negligence, but that any general proof of negligence tending to show that the loss was occasioned thereby, which satisfies the jury, is sufficient.[52] The liability of persons carrying the mails on contract is the same as that of postmasters, for their own misfeasances.[53] It is also held that a driver or assistant employed and paid by the contractor is employed in the government service, and that the contractor is not liable for his acts.[54] The courts do not interfere with the acts of the department in delivering the mails, unless there is a clear right shown by the person asking interference.[55]

[49] Lane v. Cotton, 1 Ld. Raym. 646; Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613; Schroyer v. Lynch, 8 Watts. (Pa.) 453; Dunlop v. Munroe, 7 Cranch (U. S.) 242, 3 L. ed. 329.

[50] Whitfield v. Le Despencer, 2 Cowp. 754; Bishop v. Williamson, 11 Maine 495; Hutchins v. Brackett, 2 N. H. 252, 53 Am. Dec. 248; Schroyer v. Lynch, 8 Watts. (Pa.) 453; Dunlop v. Munroe, 7 Cranch (U. S.) 242, 3 L. ed. 329.

[51] Raisler v. Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. 213; Bishop v. Williamson, 11 Maine 495; Christy v. Smith, 23 Vt. 663.

[52] Raisler v. Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. 213; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632; Danforth v. Grant, 14 Vt. 283, 39 Am. Dec. 224; Christie v. Smith, 23 Vt. 663.

[53] Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248; Conwell v. Voorhees, 13 Ohio 523, 42 Am. Dec. 206.

[54] Central R. & Banking Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334; United States v. Belew, 2 Brock. (U. S.) 280, Fed. Cas. No. 14563. See Bankers' Mut. Casualty Co. v. Minneapolis &c. R. Co., 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397; Boston Ins. Co. v. Chicago &c. R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796.

[55] Central Trust Co. v. Central Trust Co. of Illinois, 216 U. S. 251, 54 L. ed. 469, 17 Am. & Eng. Ann. Cas. 1066 and note.

CHAPTER VIII.

CARRIERS OF GOODS—SUBJECT DEFINED AND DISTINGUISHED.

§ 121. Contract of carriage a bailment.
122. Common carrier defined.
123. Private carriers.
124. Distinctions between public and private carriers.
125. Further of distinctions—Exceptions to rules.
§ 126. Further of elements necessary to constitute common carrier.
127. Kinds of common carriers with reference to means of transportation.
128. Who are not common carriers.
129. Common carrier's extraordinary liability as bailee.

§ 121. Contract of carriage a bailment.—Among the classes of bailments upon consideration for mutual benefit, included in our general outline of bailments, was that of contracts of carriage, or locatio operis mercium vehendarum. Under our general definition of a bailment as a contract by which the possession of personal property is temporarily transferred from the owner to another for the accomplishment of some special purpose, it is at once apparent that the contract entered into by the carrier of goods is a contract of bailment. In contracts for the carrying of goods, the possession of the goods is temporarily transferred by the owner to the carrier in order that they may be transported from the place of delivery to some other place which the owner directs, there to be redelivered by the carrier to the owner in accordance with his directions. Contracts for carriage are distinguished from other contracts of bailment in two essential particulars: first, the greatly disproportionate number of such contracts entered into as compared with other bailments makes the subject of carriers one of the most important of modern law; second, because of the public nature of the carrier's duties, there are certain special features and liabilities pertaining to contracts of carriage not pertaining to ordinary bailments.[1]

[1] The relationship between the law of carriers and the general law of bailments and the difficulties of the subject were very aptly expressed by Mr. Schouler in the following quotation from his work on bailments: "Our previous study has cleared the way for discoursing at length

§ 122. **Common carrier defined.**—The general definition of a common carrier is that of Chief Justice Parker, in the case of Dwight v. Brewster as "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place."[2] More specifically, the common carrier undertakes upon certain lawful terms offered to the public by him, and by the methods and means which he holds out, to carry for hire the kinds of goods which he represents himself as carrying, from place to place, for all who apply to him for such services, and he is by law liable for refusal to carry goods under the conditions of his holding out to the public.[3] Thus the carrier enters into a contract implied by law, if not express, every time he accepts goods for carriage, and is liable for the violation of such contract, while if he violates the duty of a carrier by his negligence, he is also liable in tort, and in many cases the carrier may be sued either in contract or in tort for the same act.[4] It is somewhat difficult to separate contract liability from tort liability in treating the subject of carriers, but the aim of the present article is to deal with it from the standpoint of contract relations, and to make only incidental reference to torts of carriers.

upon a final topic, included under the head of Bailments, which, in practical consequence to modern society and modern jurisprudence, overshadows all the others grouped together. The law of Carriers has not only become already of surpassing magnitude, but of surpassing intricacy; the keenest intellect of practitioners and the most profound wisdom of judges serve hardly to unravel and lay open its principles; distinctions relied upon in the decisions seem often unnatural, forced, and contradictory, as though the law were training itself into suppleness, in order that courts and juries might deal with individual cases according to discretion. Here we find courts deciding with a bias in favor of great corporations at one time, and of the public at another; and counsel most acute to shift the burden of proof from one litigant to the other. And unless we determine to take no precedent for more than it is worth, to keep fast hold of fundamental bailment principles, and bear constantly in mind that this transportation of movable property to and fro, which involves immense mercantile and commercial interests, such as the ancient world never dreamed of, is but a bailment, whose essence consists in the delivery of a chattel for the accomplishment of a certain purpose, to be succeeded by delivering it back or over when that purpose is accomplished, and that the present idiosyncrasy simply consists in an extraordinary degree of responsibility to which public policy chooses to subject the class of bailees known as common carriers, we shall lose our most needful clue." Schouler on Bailments (3d ed.), § 330.

[2] Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133. See also, The Cafe Charles, 198 Fed. 346, 349.

[3] See 2 Kent. Com. 598; Story Bailments (9th ed.), § 495; Hutchinson Carriers, § 47.

[4] Even where a passenger is injured by a carrier's negligence, he

§ 123. **Private carriers.**—A private carried is one who does not hold out to the public that he will carry for all, but who upon a particular occasion or occasions undertakes to carry the goods of another, either gratuitously or for hire.[5] The principles governing the rules of ordinary bailments and contracts of hiring apply almost in their entirety to the law of private carriers. If one carries goods gratuitously, the law of gratuitous bailments applies.[6] If he carries for hire, he is liable for ordinary care only in the performance of his contract,[7] and, unlike a common carrier, may restrict by contract his liability to almost any degree, even for his own negligence.[8] He carries entirely according to the terms of his contract, subject to the ordinary liability of the bailee for hire, may carry for whom he pleases, when and where he pleases, and is under no obligations in any manner as holding himself out to the public.[9]

§ 124. **Distinctions between public and private carriers.**—The essential distinction between the common and private carrier lies in the fact that the former is under a public duty to

may elect between an action for breach of contract and an action in tort. Aiken v. Southern R. Co., 118 Ga. 118, 44 S. E. 828, 62 L .R. A. 666, 98 Am. St. 107. See also, Kansas City F. S. & M. R. Co. v. Becker, 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814, 77 Am. St. 78; Nevin v. Pullman &c. Co., 106 Ill. 222, 46 Am. Rep. 688; Louisville & N. R. Co. v. Gaines, 36 S. W. 174, 99 Ky. 411, 59 Am. St. 465; McKeon v. Chicago M. & St. P. Ry. Co., 94 Wis. 477, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. 910. And where a carrier contracted to furnish safe and properly inspected cars, he is liable in contract for the death of an employé of the shipper caused by defective cars. Hoosier Stone Co. v. Louisville &c. R. Co., 131 Ind. 575, 31 N. E. 365. For negligence of the carrier in transporting stock, the shipper may sue ex contractu, or ex delicto. Eckert v. Pennsylvania R. Co., 211 Pa. St. 267, 60 Atl. 781, 107 Am. St. 571. See § 273, post.

[5] Hutchinson Carriers, § 35; Elliott R. R. (2d ed.), §§ 1396, 1397; Pennewill v. Cullen, 5 Harr. (Del.) 328; The Cafe Charles, 198 Fed. 346, 349. A private carrier is one who acts in a particular case for hire or reward. A common carrier is one who undertakes to transport goods for the general public and is compelled to do so by law. O'Rourke v. Bates, 73 Misc. (N. Y.) 414, 133 N. Y. S. 392.

[6] See previous chapter on gratuitous bailments. Hutchinson Carriers (3d ed.), §§ 16-34; Coggs v. Bernard, 2 Ld. Raym. 909.

[7] Story Bailments (9th ed.), § 399; Central of Ga. R. Co. v. Glascock, 117 Ga. 938, 43 S. E. 981; Jaminet v. American Storage and Moving Co., 109 Mo. App. 257, 84 S. W. 128; United States v. Power, 6 Mont. 271, 12 Pac. 639; Ames v. Belden, 17 Barb. (N. Y.) 513; White v. Bascom, 28 Vt. 268.

[8] Hutchinson Carriers, § 40; Elliott R. R. (2d ed.), § 1397; Wells v. Steam Nav. Co., 2 Coms. (N. Y.) 204; Alexander v. Greene, 3 Hill (N. Y.) 9, revg. 7 Hill (N. Y.) 533.

[9] Robinson v. Dunmore, 2 Bos. & P. 416; Kimball v. Rutland &c. R. Co., 26 Vt. 247, 62 Am. Dec. 567.

carry for every one, under certain conditions, usually of his own making, so that if he refuses to carry within these limitations, he is liable.[10] The common carrier who holds himself out as carrying for the public is engaged in carrying as a business and he must carry for the public[11] goods of the character for which his business is conducted[12] over his usual route[13] and by his usual means for hire[14] upon compliance with reasonable conditions[15] common to all who may seek his services, and, if without sufficient reason he refuses or fails to do any of these things, he is liable. Since his employment is public, he owes the public a duty, and by law a strict responsibility is imposed upon him for this reason, and the common carrier is held to be under the duty to carry for all, and to be the insurer of the safety of the goods while the same are in his possession as carrier, except against certain legal perils as to which he is not an insurer.[16] Thus the question becomes important as to whether one carrying goods is a private or a common carrier, and the answer is held to depend on whether the carrier has held himself out, expressly or impliedly, as willing to carry the particular class of goods between

[10] Schloss v. Wood, 11 Colo. 287, 17 Pac. 910; Long v. Brady, 73 Conn. 707, 49 Atl. 199; Central of Ga. R. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Varble v. Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435; O'Rourke v. Bates, 73 Misc. (N. Y.) 414, 133 N. Y. S. 392. See also, Piedmont Mfg. Co. v. Columbia &c. R. Co., 19 S. Car. 353, quoted in The Cafe Charles, 198 Fed. 346, 349.

[11] Nugent v. Smith (1875), L. R. 1 C. P. Div. 19 & 423; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Southern Exp. Co. v. Rose, 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619 and notes; Allen v. Sackrider, 37 N. Y. 341; Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86.

[12] Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Kansas Pac. R. Co. v. Nichols, 9 Kans. 235, 12 Am. Rep. 494; Michigan S. & N. I. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Honeyman v. Oregon & Cal. R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20; Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 25, 23 Am. St. 86.

[13] Hutchinson Carriers (3d ed.), § 60; Elliott R. R. (2d ed.), § 1569; Chicago &c. R. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161n, 24 U. S. App. 589; Pittsburg &c. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Pitlock v. Wells, 109 Mass. 452; Coup v. Wabash &c. R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374.

[14] Knox v. Rives, 14 Ala. 249, 48 Am. Dec. 97; Central R. & B. Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334; New York Cent. R. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Citizens' Bank v. Nantucket Steamboat Co., 2 Story (U. S.) 16, Fed. Cas. No. 2730.

[15] See § 130 infra.

[16] See Hutchinson Carriers (3d ed.), § 48 and notes; Elliott R. R. (2d ed.), § 1454. See § 164 et seq., infra.

the points of carriage for all who may apply to him, indiscriminately and without differentiation, for thus only does his employment become common and public in character, and the one who has not put himself within this definition is held a private carrier.[17]

§ 125. **Further of distinctions—Exceptions to rules.**—Yet, in a few instances, there have been exceptions to the general rule and current of authority as in the leading case of Gordon v. Hutchinson. The court held that the responsibility of a common carrier rested upon a farmer who applied to a merchant to haul for him a load of goods from Lewiston to Bellefonte, upon his return from hauling a load of iron to Lewiston. He was engaged, and because the contents of a hogshead of molasses were lost by the head coming out, the merchant brought action against the farmer, who was held to be a common carrier under the circumstances, not because he was accustomed to carry for the public, but for the reason that, as he had himself sought the employment, he was considered to have done so on the usual conditions, not on terms of diminished responsibility.[18] Another case went so far as to hold a farmer who sometimes ran boats for himself or others, and who had abandoned a contemplated trip for himself at the plaintiff's solicitation and loaded his own boat and plaintiff's with lumber for market, liable as a common carrier to the plaintiff for the loss of part of the lumber on the trip. It seems that the reason of this decision was that, since carriage by river craft was very common in those days, such carriers should be held bound more strictly than mere private carriers.[19] These cases are exceptions, not generally followed, and in circumstances almost exactly similar both to the first[20] and the second,[21] the courts have held that the carrier was a private carrier.

§ 126. **Further of elements necessary to constitute common carrier.**—The general rule, so firmly settled as to be

[17] See cases cited under note 11.
[18] Gordon v. Hutchinson, 1 Watts & S. (Pa.) 285, 37 Am. Dec. 464.
[19] Moss v. Bettis, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1.
[20] Samms v. Stewart, 20 Ohio 69.
[21] Steele v. McGyer, 31 Ala. 667; The Dan, 40 Fed. 691; Flautt v. Lashley, 36 La. Ann. 106; Fish v. Clark, 2 Lans. (N. Y.) 176, affd., 49 N. Y. 122.

elementary, is that one to be subjected to the liability of a common carrier must have held himself out as carrying for all in such manner that an action would lie for his refusal to carry for any person applying, within the restrictions of his holding out.[22] A common carrier undertakes to carry only certain kinds of goods, therefore he is liable only as a private carrier, if, as accommodation, or by special contract, he agrees to carry goods not in the line of his ordinary business.[23] Also he undertakes to carry only by the means and over the route used in his business, not by indiscriminate means, or to points not on his route, so that if he by special contract agrees to carry by other means or over other routes than those which he holds open to all, his liability would be governed by the special contract of hiring.[24] And in order to impose upon him the extraordinary liability of a common carrier, he must in some manner receive compensation for his service, otherwise he would be a mere gratuitous bailee, liable only for gross negligence.[25] There rests upon the common carrier an obligation to carry for all; therefore if he refuses to carry, an action will lie, and it was said in the leading case of Fish v. Chapman[26] that the safest test of whether one is a common carrier is his liability to respond in damages for failure to carry. It is not necessary that a carrier should make regular trips or carry only between fixed terminals, if otherwise he fulfils the requisites of a common carrier.[27]

[22] Nugent v. Smith (1875), L. R. 1 Com. Pl. Div. 19 & 423; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Lanning v. Sussex R. Co., 1 N. J. L. 21; Piedmont Mfg. Co. v. Columbia & G. R. Co. 19 S. Car. 353. See cases cited in note 10. Yet the mere fact that one holding himself out as a common carrier discriminates between patrons, accepting some and rejecting others, does not absolve him from liability as a common carrier for the loss of goods which he undertook to transport. Lloyd v. Haugh & K. Co., 223 Pa. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188n.

[23] Chicago M. & St. P. R. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; Honeyman v. Oregon & C. R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20; Memphis News Pub. Co. v. Southern Railroad Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Kimball v. Rut. & Burl. R. Co., 26 Vt. 247, 62 Am. Dec. 567.

[24] Chicago M. & St. P. R. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161.

[25] See cases cited in note 14.

[26] Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393.

[27] Liver Alkali Co. v. Johnson, L. R. 7 Ex. 267, L. R. 9 Ex. 338; Pennewill v. Cullen, 5 Harr. (Del.) 238.

§ 127. Kinds of common carriers with reference to means of transportation.—Compliance with the requirements above mentioned constitutes one a common carrier, and it makes no difference by what means he transports goods. Railroads are to-day probably the most usual common carriers, and all railroad companies conducting ordinary commercial railroads are common carriers of goods whether or not made so by charter or statute,[28] and all persons operating a railroad under the charter, whether private individuals, trustees, or receivers[29] are held to the common carrier's duties. So numerous are the cases arising under the common carrier's duty devolving upon the railroads that the greater number of the citations in this article will be from railroad cases. Perhaps next in importance are the owners of vessels, including steamboats, steamships, sailing ships, salt and fresh water vessels, and, besides the owners of larger freight vessels, may be included bargemen, lightermen, canal-boatmen, flatboatmen, raftmen, and all who by vessel offer to carry the goods of others indiscriminately for hire.[30] Public ferrymen may be common carriers, but while the liability of a ferryman is in some cases held to be absolutely that of a common carrier,[31] in

[28] Elliott Railroads (2d ed.), § 1393 and cases cited. Pickford v. Grand Junction R. Co., 12 M. & W. 766; Chicago &c. R. Co. v. Thompson, 19 Ill. 577; Norway Plains Co. v. Boston &c. R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423; Thomas v. Boston &c. R. Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Thompson &c. R. Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 23 Am. St. 86, 10 L. R. A. 251; Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434. Upon accepting a charter as a railroad company, duty arises to provide facilities to meet reasonable requirements. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320n.

[29] Elliott R. R. (2d ed.), § 1393; Davis v. Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545; Paige v. Smith, 99 Mass. 395; Rogers v. Wheeler, 43 N. Y. 598; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349.

[30] Hutchinson Carriers (3d ed.), §§ 74-75; Morse v. Slew, 1 Ventris 190; Laveroni v. Drury, 8 Exch. 166; Gage v. Girrell, 9 Allen (Mass.) 299; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; De Mott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; McGregor & Co. v. Kilgore, 6 Ohio 358, 27 Am. Dec. 260; Propeller Niagara v. Cordes, 21 How. (U. S.) 7, 16 L. ed. 41; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469; Schooner Reeside, 2 Sumner (U. S.) 567; Citizens' Bank v. Nantucket Steamboat Co., 2 Story (U. S.) 16; Hyde v. Trent &c. Nav. Co., 5 T. R. 389; Fish v. Clark, 49 N. Y. 122; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562.

[31] Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595; Fisher v. Clisbee, 12 Ill. 344; Lewis v. Smith, 107 Mass. 334; Le Barron v. East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717n; Powell v. Mills, 37 Miss. 691; Wilson v. Hamilton, 4 Ohio St. 722.

others it is held that if the goods ferried are in the custody of the owner, the strict liability of a common carrier should not be imputed to the ferryman.[32] Those who make a business of transporting the goods of the public for hire by land vehicles are common carriers; those which carry passengers may be if they also carry goods for hire.[33] So among those who have been held to be common carriers are the owners of drays, trucks, stage coaches, omnibuses, sleds, street cars if carrying goods, hacks, and passenger-carrying vehicles as to the baggage of their passengers.[34] Express companies are among the most extensive common carriers, and are held such although they transport goods by instrumentalities owned by others, since the essential part of their contract is that the goods shall be carried to their destination, and it makes no difference that the contracting company does not at all times have direct control of the means of transportation.[35] Warehousemen, wharfingers or forwarders may be common carriers if the deposit of goods with them is merely an incident of their carriage or their transportation,[36] but if goods are left with a forwarder or warehouseman which are to be shipped according to future orders to be given by the owner, or to be put into con-

[32] White v. Winnisimmet Co., 7 Cush. (Mass.) 155; Wyckoff v. Queen County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650.

[33] Hutchinson Carriers (3d ed.), §§ 68, 70.

[34] Those transporting goods by drays or transfer wagons may be common carriers. Arkadelphia Milling Co. v. Smoker Mdse. Co. (Ark.), 139 S. W. 680; Model Clothing Co. v. Columbia Tr. Co. (Mo. App.), 139 S. W. 242. Also, hackney coaches (Bonce v. Dubuque St. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; Budd v. Carriage Co., 25 Ore. 314, 35 Pac. 660, 27 L. R. A. 279), omnibuses (Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Parmelee v. McNulty, 19 Ill. 556), sleds (Robertson v. Kennedy, 2 Dana (Ky.) 430, 26 Am. Dec. 466), other land vehicles, city express companies, transfer companies, &c. (Jackson Architectural Iron Works v. Hurlburt, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. 432; Hebard v. Riegel, 67 Ill. App. 584; Richards v. Westcott, 2 Bosw. (N. Y.) 589; Verner v. Sweitzer, 32 Pa. St. 208).

[35] Hutchinson Carriers (3d ed.), §§ 80-84; Elliott R. R. (2d ed.), § 1401; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Gulliver v. Adams Exp. Co., 38 Ill. 503; Beickland v. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; United States Exp. Co. v. Root, 47 Mich. 231, 10 N. W. 351; Bardwell v. American Exp. Co., 35 Minn. 344, 28 N. W. 925; American Exp. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Stadhecker v. Combs, 9 Rich. L. (S. Car.) 193.

[36] Story Bailments (9th ed.), § 536; Forward v. Pittard, 1 T. R. 27; Pontifex v. Hartley (1893), 62 L. J. Q. B. 196; Schloss v. Wood, 11 Colo. 287, 17 Pac. 910.

dition by the owner before shipping, the warehouseman is not as to those goods a common carrier.[37]

§ 128. **Who are not common carriers.**—Ship-owners are usually common carriers, yet this is true only when the essential elements of a carrier are present.[38] Tug boats and towing boats are ordinarily not common carriers, because the goods are not placed in the actual custody and possession of the towing boat.[39] A railroad transporting a circus train is not a common carrier, but a carrier under special contract.[40] Neither is the railway company a common carrier in the transporting of special trains. It is not the duty of the carrier as such to carry by special train on demand, or to move trains made of cars by other persons.[41] In fact, no carrier is bound to transport all kinds of goods, but only those which he holds himself out as carrying.[42] The post-office is not a common carrier, neither are its agents, postmasters, mail contractors, or mail carriers, since they are merely agents of the government performing a public service, and as such are not liable to action.[43] Telegraph and telephone companies as to the carrying of messages are not common carriers, by the weight of authority,[44] although the contrary has been

[37] Murray v. International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. 290; Michigan Southern & N. I. R. Co. v. Shurtz, 7 Mich. 515; O'Neill v. New York Cent. & H. R. Co., 60 N. Y. 138; Wade v. Wheeler, 3 Lans. (N. Y.) 201; Schmidt v. Chicago & N. W. R. Co., 90 Wis. 504, 63 N. W. 1057.

[38] Hutchinson Carriers (3d ed.), § 74; Parson's Shipping, 174; Liver Alkali Co. v. Johnson, L. R. 9 Exch. 338.

[39] Hutchinson Carriers (3d ed.), § 92; Preston v. Biornstad, L. R. (1898) App. Cas. 513; Knapp &c. Co. v. McCaffery, 178 Ill. 107, 52 N. E. 898, 69 Am. St. 290; Varble v. Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435; Wells v. Steam Nav. Co., 2 App. Div. (N. Y.) 204; Hays v. Millar, 77 Pa. St. 238; The Steamer Webb, 14 Wall. (U. S.) 406, 21 L. ed. 774.

[40] Chicago, M. & St. P. R. Co. v. Wallace, 66 Fed. 506, 30 L. R. A. 161n; Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. 482; Coup v. Wabash, St. L. & P. R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. St. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. 672.

[41] Hutchinson Carriers (3d ed.), § 88; Coup v. Wabash, St. L. & P. R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374.

[42] See cases cited in notes 12 and 23.

[43] Central R. Co. v. Lampley, 76 Ala. 357; Boston Ins. Co. v. Chicago, R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796. See ante, § 120.

[44] Tyler v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Western Union Tel. Co. v. Carew, 15 Mich. 524; Leonard v. Telegraph Co., 41 N. Y. 544; Western Union Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Western Union Tel. Co. v. Mumford, 87 Tenn. 190, 10 S. W. 318, 2 L. R. A. 601n, 10 Am. St. 630.

held.[45] Livery stable keepers are not common carriers,[46] nor log-driving companies,[47] messenger companies in general,[48] nor bridge, canal and turnpike companies, which merely offer a roadway to others.[49]

§129. Common carrier's extraordinary liability as bailee. —In preceding sections it has been shown that the innkeeper is held to a greater degree of care for the safety of the baggage of his guests than is the ordinary bailee, for the reason that his employment is public in its nature, and the public are generally compelled to trust themselves and their effects to the innkeeper. Upon similar considerations of public policy, the law early imposed upon the common carrier an extraordinary liability, and made him an insurer of the goods carried against all loss or damage, save by certain excepted perils, which were the act of God or the public enemy, agencies beyond the carrier's control entirely. Lord Holt early stated the grounds of this doctrine in the following words, which have been accepted by later courts: "This is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."[50] But the modern law of carriers has grown vastly between the days of wagon carriers and the present time, when powerful

[45] Central Union Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Pacific Tel. Co. v. Underwood, 37 Nebr. 315, 55 N. W. 1057, 40 Am. St. 490; State v. Tel. Co., 114 Tenn. 194, 86 S. W. 390.

[46] See ante, § 76, Stanley v. Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561; Copeland v. Draper, 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283, 34 Am. St. 314; Siegrist v. Arnot, 86 Mo. 200, 56 Am. Rep. 425.

[47] Mann v. White River L. & B. Co., 46 Mich. 38, 8 N. W. 550.

[48] Haskell v. Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. 324.

[49] Kentucky &c. R. Co. v. R. Co., 37 Fed. 567; Exchange Fire Ins. Co. v. Delaware & Hudson Canal Co., 10 Bosw. (N. Y.) 180; Grigsby v. Chappell, 5 Rich. (S. Car.) 443; Lake Superior & M. R. Co. v. United States, 93 U. S. 444, 23 L. ed. 965, 12 Ct. Cl. 35.

[50] Coggs v. Bernard, 2 Ld. Raym. 909.

railroad, express and navigation corporations conduct by far the greater portion of the carrying business. The law has gradually recognized the right to limit the extraordinary liability of the carrier as an insurer, by contract, in some jurisdictions permitting limitation only to a small degree, yet the fact remains that almost all carrying to-day is under a special contract, and the majority of the cases which arise in the courts with regard to carriers of goods have to do with the construction of special contracts of carriage, and with the degree to which such contracts have varied the common-law liability of the carrier. Modern conditions are such, however, that in the matter of contracting there is not an equality between the parties, since most carriers use printed forms of contracts with many clauses and stipulations, which in most instances the shipper accepts, if he does in fact accept them, hastily and without a full comprehension of their import and effect, so that such contracts are construed most strongly against the carrier. Here, again, enters an avenue of conflict, for while a carrier is held strictly to the terms of his contract and the shipper must assent to the terms of a printed form in order to be bound thereby, yet, as we have seen, the carrier is liable only to the extent of his holding out to the public, within the limits of reasonable rules and regulations, and as the shipper's assent to these conditions of holding out is not essential, the question often arises, though in some cases it has been lost sight of, as to whether a certain stipulation which the carrier seeks to take advantage of is merely a regulation, or a part of its holding out, or is a provision of a contract, invalid unless the shipper has assented thereto. In later sections this question of limitation of liability by contract will be discussed at some length.

CHAPTER IX.

CREATION OF RELATION OF COMMON CARRIER, AND BEGINNING OF LIABILITY.

§ 130. Duty to receive goods offered.
131. Time of delivery to carrier.
132. Place of delivery.
133. By whom delivery must be made.
134. To whom delivery must be made.
§ 135. Constructive delivery.
136. Completion of delivery and acceptance by carrier.
137. Notice to carrier of delivery.
138. Delivery to connecting carrier.
139. Carrier's duty to accept.

§ 130. Duty to receive goods offered.—As we have seen, in order to consider one a common carrier, he must be under such a duty to accept goods of the character which he holds himself out to carry, within certain reasonable restrictions which he may make as to the time, manner, and place of delivery, and the condition of the goods, that an action will lie against him for refusal to carry goods offered to him for carriage which comply with the above requirements.[1] In order to impose upon any carrier liability as an insurer, there must be a delivery of the goods to him, and an acceptance of the same, and liability as a carrier does not begin until the delivery has been completed by acceptance for carriage.[2] In the sections immediately succeeding we shall consider the various elements essential to constitute delivery and acceptance.

§ 131. Time of delivery to carrier.—The delivery must be made for immediate transportation. If the goods are delivered to the carrier to be held for a certain time, or until the happening

[1] Nugent v. Smith, L. R. 1 C. P. Div. 19,423; St. Louis S. W. R. Co. v. State, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. 33; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, Ocean Steamship Co. of Savannah v. Savannah Locomotive &c. Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. 265, 15 Am. & Eng. Ann. Cas. 1044; Piedmont Mfg. Co. v. Columbia &c. R. Co., 19 S. Car. 353. A statute imposing such a duty on a common carrier is merely declaratory of the common law. St. Louis S. W. R. Co. v. State, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. 33.

[2] Schouler Bailments (3d ed.), § 284; Hutchinson Carriers (3d ed.), §§ 124, 125; Elliott R. R. (2d ed.), §§ 1454, 1462.

of a certain event, or until something more is done to them by the owner, or to be shipped in accordance with his future orders, the liability of a carrier has not begun, and does not begin until the conditions upon which the goods are held have been performed.[3] If the delivery is made for the goods to be transported as soon as they can be in the ordinary course of the carrier's business, and delays to which they are subject are only those caused by necessity, or by the carrier's instrumentality, the liability of a common carrier at once attaches.[4] This is true, if the goods are received for transportation purposes only, even if the shipper is to load them into the cars.[5] A mere delivery to the carrier of goods marked with the name and address of the consignee, in the absence of directions or agreement, or previous custom of dealing, imposes upon the carrier the obligation to forward the goods at once, as soon as the ordinary course of his business permits, and causes the common carrier's liability to attach.[6] However, if

[3] Mt. Vernon Co. v. Alabama &c. R. Co., 92 Ala. 296, 8 So. 687; Little Rock &c. R. Co. v. Hunter, 42 Ark. 200; St. Louis I. M. & S. R. Co. v. Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17; Truax v. Philadelphia &c. R. Co., 3 Houst. (Del.) 233; Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Rogers v. Wheeler, 52 N. Y. 262; O'Neill v. New York & H. R. R. Co., 60 N. Y. 138; Basnight v. Atlantic &c. R. Co., 111 N. Car. 592, 16 S. E. 323; St. Louis, I. M. & S. R. Co. v. Knight, 7 Sup. Ct. 1132, 122 U. S. 79, 30 L. ed. 1077; note, 97 Am. St. 84-6; Elliott R. R. (2d ed.), § 1409, and cases cited; Burrowes v. Chicago, B. & Q. R. Co., 85 Nebr. 497, 123 N. W. 1028, 34 L. R. A. (N. S.) 220, in which case a car was partly loaded with a tent show on Saturday and the owner retained part of the goods until Monday morning for his own use, and it was held there was no delivery. See Central of Ga. R. Co. v. Sigma Lumber Co., 170 Ala. 672, 54 So. 205, Ann. Cas. 1912D. 965, where cars were loaded and left at usual place, and carrier notified, but shipping directions were yet to be given.

[4] Story on Bailments (3d ed.), §§ 534, 536; North German Lloyd S. S. Co. v. Bullen, 111 Ill. App. 426; Fitchburg &c. R. Co. v. Hanna, 6 Gray (Mass.) 539; Moses v. Boston & M. R. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Clark v. Needles, 25 Pa. St. 338. See Greene v. Louisville &c. R. Co., 163 Ala. 138, 50 So. 937, 136 Am. St. 67, holding that a carrier which fails to move a carload of lumber within a reasonable time after notice and request from shipper to do so is liable for the burning of the lumber caused without other fault of the carrier; and Garner v. St. Louis, I. M. & S. R. Co., 79 Ark. 353, 96 S. W. 187, 116 Am. St. 83, holding that making out a bill of lading is not necessary to complete delivery.

[5] London & L. Fire Ins. Co. v. Rome &c. R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. 752.

[6] Elliott R. R. (2d ed.), § 1409, and cases cited; Grand Tower Mfg. & Transp. Co. v. Ullman, 89 Ill. 244; Gregory v. Wabash R. Co., 46 Mo. App. 574; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Clarke v. Needles, 25 Pa. St. 338.

the relation of carrier has once been established, and the owner afterward gives orders to delay the transportation, it has been held that the relation of carrier ceases, and that of warehouseman attaches.[7]

§ 132. **Place of delivery.**—In general the carrier appoints the place of delivery, but, to bind the carrier, delivery need not be made at this ordinarily appointed place, if made at another place to an agent authorized to receive.[8] So delivery to the agent of a stage company at a place other than the carrier's office has been held good.[9] On the other hand, it is not sufficient to deliver to the driver of a stage or express company at a place other than the company's office, unless there is evidence of authority to receive,[10] though the carrier may be made liable because of usage so to receive goods.[11] Usually goods must be delivered to railroad companies at established stations, yet there may be shown a usage to receive goods at an unusual place, as cotton stored on or beside a platform or in a yard.[12]

§ 133. **By whom delivery must be made.**—The delivery may be made by the shipper himself, or by his authorized agent. If an agent is to deliver to a carrier, the latter, unless he knows of some limitations upon the agent's authority, may consider that the agent has full powers to carry out the purpose of the agency, and the agent's directions and contract as to the time, manner of transportation or terms and conditions of transportation will be binding on the principal, and he may by contract release the carrier from his common-law liability.[13] The

[7] St. Louis, Alton & P. C. R. Co. v. Montgomery, 39 Ill. 335.

[8] Georgia &c. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Missouri &c. Oil Co. v. Hannibal &c. R. Co., 35 Mo. 84; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; Cronkite v. Wells, 32 N. Y. 247.

[9] Phillips v. Earle, 8 Pick. (Mass.) 182.

[10] Blanchard v. Isaacs, 3 Barb. (N. Y.) 388.

[11] See post, § 135, Constructive Delivery.

[12] Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Meyer v. Vicksburg &c. R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. 408; Ft. Worth &c. R. Co. v. Martin, 12 Tex. Civ. App. 464, 35 S. W. 21.

[13] Hutchinson Carriers (3d ed.), §§ 108, 467; Elliott R. R. (2d ed.), § 1406; Mechem Agency, § 311; Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Russell v. Erie R. Co., 70 N. J. L. 808, 1 Am. & Eng. Ann. Cas. 672, 59 Atl. 150, 67 L. R. A. 433; Nelson v. Hudson River R. Co., 48 N. Y. 498; York Mfg. Co. v. Illinois Cent. R. R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170;

initial carrier to which goods are delivered to be delivered to another carrier at the end of its route may be the owner's agent to deliver to such second carrier.[14] The placing of goods in the hands of an ordinary drayman, however, to deliver to a carrier does not make him the owner's agent to release the carrier from his liability as insurer.[15] The consignor is the agent of the consignee in shipping goods and whatever contract he makes with the carrier generally binds the consignee, so that if the consignor selects a car unsuitable for certain goods, the defects being apparent upon inspection of the car, the carrier is not liable.[16] It has been held that if the contract of shipment is made directly with the consignee he may sue in his own name for a breach of contract, without reference to the ownership of, or property in, the goods.[17]

§ 134. **To whom delivery must be made.**—The delivery may be made to the carrier's agent, and a placing of a person in charge of a place ordinarily used by the carrier for the reception of goods, and holding him out as a representative to receive and accept goods, will cause his acts in such a capacity to bind the carrier.[18] It has, therefore, been held that a passenger is justified in considering a man whom he sees handling baggage as the agent of the company,[19] that if goods are delivered to one in a freight office who receives and receipts for the goods with the knowledge of the agent who does not object, it is a delivery to the carrier,[20] and that placing a trunk beside a locked baggage crate at the depot, and informing the ticket agent, who answered, "All right," is a delivery to the carrier, even though another person had charge of the receiving of freight, upon the ground that the

Benson v. Oregon Short Line Co., 35 Utah 241, 99 Pac. 1072, 136 Am. St. 1052, 19 Am. & Eng. Ann. Cas. 803.

[14] See § 253 on Delivery to Connecting Carrier; Harrington v. Wabash R. Co., 108 Minn. 257, 122 N. W. 14, 23 L. R. A. (N. S.) 745n.

[15] Russell v. Erie R. Co., 70 N. J. L. 808, 7 Am. & Eng. Ann. Cas. 672; Benson v. Oregon Short Line Co., 35 Utah 241, 99 Pac. 1072, 136 Am. St. 1052, 19 Am. & Eng. Ann. Cas. 803.

[16] Frohlich v. Pennsylvania R. Co., 138 Mich. 116, 101 N. W. 223, 110 Am. St. 310.

[17] Chicago & A. R. Co. v. Shea, 66 Ill. 471; Southern Kansas R. Co. v. Morris, 100 Tex. 611, 102 S. W. 396, 123 Am. St. 834. And see Great Western R. Co. v. McComas, 33 Ill. 185.

[18] Harrell v. Wilmington &c. R. Co., 106 N. Car. 258, 11 S. E. 286, 42 Am. & Eng. R. Cas. 417. See Elliott R. R. (2d ed.), § 1406 and cases cited.

[19] Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

[20] Harrell v. Wilmington &c. R. Co., 106 N. Car. 258, 11 S. E. 286, 42 Am. & Eng. R. Cas. 417.

company held out the ticket agent to the world as in charge of the depot.[21] Delivery to a drayman or servant of the carrier who is accustomed to receive goods for the carrier at the place of business of the patrons is a good delivery to the company.[22] But delivery to one, the nature of whose employment is such that he could not reasonably be thought to have authority to receive, is not a delivery to the carrier, unless there is shown that such person had in fact or by custom authority to receive.[23] This applies to delivery to deck-hands on a boat.[24] The agent at one station may have a right to contract for a shipment from another place, but if such is claimed the plaintiff must prove it.[25]

§ 135. Constructive delivery.—By a particular agreement between the parties, or particular course of dealing between them, or by usage, delivery may be made by depositing goods at certain places, without their actual acceptance either by the carrier or an agent authorized to receive them, and even without express notice to the carrier, and this is held a constructive delivery to the carrier.[26] Examples are the depositing of goods upon the private wharf of the carrier, where it was accustomed to receive and transport goods thus left,[27] or the leaving of a trunk in the waiting-room of a station, the employés being at supper, proof having been made that drayman leaving the trunk had often left trunks

[21] Rogers v. Long Island R. Co., 2 Lans. (N. Y.) 269.

[22] Davey v. Mason, Car. & M. 45; Baxendale v. Hart, 6 Exch. 769; Wilmington Dental Mfg. Co. v. Adams Exp. Co., 8 Houst. (Del.) 329, 32 Atl. 250; Quarrier v. Baltimore & O. R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 535.

[23] Hutchinson Carriers (3d ed.), § 107; Elliott R. R. (2d ed.), §§ 1407, 1408 and cases cited.

[24] Trowbridge v. Chapin, 23 Conn. 595; Ford v. Mitchell, 21 Ind. 54.

[25] McManus v. Chicago Great Western R. Co., 138 Iowa 150, 115 N. W. 919, 128 Am. St. 180; Voorhees v. Chicago, R. I. & P. R. Co., 71 Iowa 735, 30 N. W. 29, 60 Am. Rep. 823; Burgher v. Chicago, R. I. & P. R. Co., 105 Iowa 335, 75 N. W. 192; Phillips v. Earle, 8 Pick. (Mass.) 182; Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co., 35 Mo. 84; Cronkite v. Wells, 32 N. Y. 247.

[26] Hutchinson Carriers (3d ed.), § 115; Southern R. Co. v. Bickley, 119 Tenn. 528, 107 S. W. 680, 14 L. R. A. (N. S.) 859n, 123 Am. St. 754, 14 Am. & Eng. Ann. Cas. 910. See also, Ethridge v. Central of Ga. R. Co., 136 Ga. 677, 71 S. E. 1063, Ann Cas. 1912D. 128 and note. See cases cited in notes 27 to 30.

[27] Merriam v. Hartford &c. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Converse v. Norwich &c. Transportation Co., 33 Conn. 166. See Truax v. Philadelphia &c. R. Co., 3 Houst. (Del.) 233, and Washburn Crosby Co. v. Boston &c. R. Co., 180 Mass 252, 62 N. E. 590.

similarly before,[28] or leaving cotton upon a platform erected to receive cotton for shipment, or in the street along such platform in accordance with custom,[29] or depositing hay at the usual place of loading hay, in following the usage of the parties.[30] In all these cases, however, there must be shown either agreement or usage, and one cannot deliver goods to a carrier by simply depositing them along its line, in the absence of agreement or usage to give to the carrier constructive notice. Where one, intending to become a passenger, sent his trunk to a boat, and failed to go upon the boat as a passenger, although it was shown that the trunk was delivered by a customary method, it was held that there was shown no usage to receive freight in this manner, as the trunk, unaccompanied by its owner, was freight and not baggage, and that there had been no delivery.[31] The delivery of a baggage check by one carrier to another is not such a constructive delivery of the baggage as to charge the carrier accepting the check before the baggage actually comes into its possession.[32]

§ 136. **Completion of delivery and acceptance by carrier.** —In actions against carriers, it is frequently extremely important to know just when the carrier's liability attaches by completion of delivery. The general rule is that when goods have been tendered to the carrier, his liability begins the instant he accepts them, but to make the delivery and acceptance complete the goods must be placed in his sole possession and custody, and the owner must have abandoned all control over them for the purpose of the bailment.[33] Formal acceptance by the carrier is not necessary.[34] Delivery to a vessel is completed when the master, mate,

[28] Green v. Milwaukee & St. P. R. Co., 41 Iowa 410, 38 Iowa 100.

[29] Montgomery &c. R. Co. v. Kolb & Hardaway, 73 Ala. 396, 49 Am. Rep. 54; Meyer v. Vicksburg &c. R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. 408.

[30] Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296.

[31] Wright v. Caldwell, 3 Mich. 51.

[32] Southern R. Co. v. Bickley, 119 Tenn. 528, 107 S. W. 680, 14 L. R. A. (N. S.) 859n, 123 Am. St. 754, 14 Am. & Eng. Ann. Cas. 910. Nor is the delivery of warehouse receipts to a carrier a delivery of goods to him. Stewart v. Gracy, 93 Tenn. 314, 27 S. W. 664.

[33] Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Merritt v. Old Colony & N. R. Co., 11 Allen (Mass.) 80; Stapleton v. R. Co., 133 Mich. 187, 94 N. W. 739; Doan v. St. Louis, K. & N. R. Co., 38 Mo. App. 408; East Line &c. R. Co. v. Hall, 64 Tex. 615.

[34] Aiken v. Chicago &c. R. Co., 68 Iowa 363, 27 N. W. 281; Merriam v. Hartford &c. R. Co., 20 Conn. 354, 52 Am. Dec. 344.

or any agent of the owner receives the goods, whether this be upon the ship, upon the beach, at a warehouse, or at any other place where such authorized agent may agree to receive them.[35] So liability may attach where a lighterman, employed by a vessel whose draft is too great to come to a wharf, receipts for and loads cotton upon his boat,[36] or when freight is delivered to a steamboat employed by the agent of an ocean steamer, which could not reach the port to take the passengers and freight, for the purpose of taking passengers and freight to the steamer,[37] or as soon as receipts have been given for goods in warehouses,[38] and a vessel or a railroad company is responsible from the time of delivery in fact, even though receipts are not made out until after the destruction of the property delivered.[39] It is held that ferrymen are responsible as common carriers from the moment goods are brought upon the drop or wharf of their boat,[40] but the better authority holds ferrymen not common carriers unless property is given into their entire custody.[41] It is usually held that the carrier has accepted the goods from the time when he commences to load them upon his conveyance.

§ 137. **Notice to carrier of delivery.**—There can be no acceptance by the carrier without notice of delivery, but, in certain cases, especially those of constructive delivery, such notice may be constructive rather than actual.[42] The mere fact that the owner of the goods has placed them upon a car does not ordinarily constitute a delivery, but to complete the delivery the owner must re-

[35] Hutchinson Carriers (3d ed.), § 120; Story Bailments (9th ed.), § 534; Abbott Shipping, ch. 3, § 3.

[36] Insurance Co. of N. America v. North German Lloyd Co., 106 Fed. 973; same case, Nord-Deutscher Lloyd v. Insurance Co. of N. America, 110 Fed. 420, 49 C. C. A. 1; Bulkley v. The Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599; The Bark Edwin, 1 Sprague's Dec. (U. S.) 477.

[37] The Oregon, Deady (U. S.) 179.

[38] Greenwood v. Cooper, 10 La. Ann. 796.

[39] Thomas v. Day, 4 Esp. 262; Merritt v. Old Colony &c. R. Co., 11 Allen (Mass.) 80; Snow v. Carruth, 1 Sprague's Dec. (U. S.) 324.

[40] Blakeley v. Le Duc, 19 Minn. 187; Cohen v. Hume, 1 McCord (S. Car.) 439; Miles v. James, 1 McCord (S. Car.) 157; Cook v. Gourdin, 2 Nott & McCord (S. Car.) 19.

[41] White v. Winnisimmet Co., 7 Cush. (Mass.) 155; Wyckoff v. Queen's County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650.

[42] Hutchinson Carriers (3d ed.), § 118; Elliott R. R. (2d ed.), § 1410; Merriam v. Hartford & N. H. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Converse v. Norwich &c. Transportation Co., 33 Conn. 166; Green v. Milwau-

linquish his control and the carrier must have notice that the goods are ready for shipment, and where the owner of the goods has done all that he is required to do, and the carrier is informed that they are ready for him, he is considered to have accepted them at the time he receives notice. Where a car loaded with lumber by the shipper burned before the carrier was notified that it was ready for shipment, the shipper had to stand the loss.[43] Similarly, where a car had been left on a side-track to be loaded with cotton, and the customary method of notifying the company was by flagging a train, and after the car was loaded, but before the coming of the train upon which it was to be taken, the cotton burned, the carrier was not liable.[44] But where, in the course of business, the company left cars to be loaded, and it was the custom for the agent to make out bills of lading when the cotton was placed on the cars, and send locomotives to move them, it was held that the company was liable as soon as the cars were loaded, and the agent informed.[45] Loading into cars is not usually a sufficient delivery unless the carrier's agent is notified and the owner has relinquished control.[46] Notifying a carrier that a car on a private switch is loaded and ready for transportation will not charge the carrier with liability as an insurer where no bill of lading has been presented for signing, and the rule of the carrier is not to move cars from the station until the bill of lading is signed, when the car is not actually in its possession.[47] If the carrier has actually undertaken the transportation of the goods offered, it is not necessary to show an express acceptance, but acceptance will be implied.[48] Entry upon a waybill, issuance of bill of lading, or checking of baggage is not essential to complete delivery, if there be an acceptance in fact.[49]

kee & St. P. R. Co., 38 Iowa 100, 41 Iowa 410.

[43] Basnight v. Atlantic &c. R. Co., 111 N. Car. 592, 16 S. E. 323.

[44] Tate v. Yazoo &c. R. Co., 78 Miss. 842, 29 So. 392, 84 Am. St. 649.

[45] Illinois Central R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301.

[46] Kansas City &c. R. Co. v. Cox, 25 Okla. 774, 108 Pac. 380, 32 L. R. A. (N. S.) 313.

[47] American Lead Pencil Co. v. Nashville &c. R. Co., 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323.

[48] Aiken v. Chicago &c. R. Co., 68 Iowa 363, 27 N. W. 281.

[49] St. Louis &c. R. Co. v. Burrow, 89 Ark. 178, 116 S. W. 198; Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Illinois Central R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Meloche v. Chicago &c. R. Co., 116 Mich. 69, 74 N. W. 301; Coyle v. Western R. Corp. 47

§ 138. Delivery to connecting carriers.—The duty to accept goods for carriage beyond the destination of the carrier, and what constitutes delivery to connecting carriers, will be considered in succeeding sections.[50]

§ 139. Carrier's duty to accept.—No common carrier professes to carry all kinds of goods, and no one is liable for a refusal to carry goods unless it can be shown that the goods offered were those which he ordinarily carried, or because of the public nature of his business, was bound to carry.[51] It has been held that a railroad carrier, which maintains within a city a freight line and separate tracks to industrial plants, cannot refuse to carry freight from one part of the system to another, on the ground that he is not a common carrier within switching limits.[52] A carrier may refuse to receive goods not properly packed[53] or of a dangerous character,[54] or which he believes for good reason are of a dangerous character.[55] Ordinarily the carrier has not the right to require a shipper who offers goods to disclose their nature, but if he

Barb. (N. Y.) 152; East Line & Red River R. Co. v. Hall, 64 Tex. 615.

[50] See §§ 247-253 infra.

[51] Hutchinson Carriers, § 144; Elliott R. R. (2d ed.), §§ 1414a, 1465, 1466; Dickson v. Great Northern R. Co., 18 Q. B. Div. 176; Pickford v. Grand Junction R. Co., 12 Mees. & W. 766; Tunnel v. Pettijohn, 2 Harr. (Del.) 48; Harp v. Choctaw, O. & G. R. Co., 118 Fed. 169, affd. 125 Fed. 445, 61 C. C. A. 405; Southern Express Co. v. R. M. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619n; Ocean Steamship Co. v. Savannah Locomotive Works &c. Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. 265; Pittsburg, C. & St. L. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; Kemp v. Coughtry, 11 Johns. (N. Y.) 107; King v. Lennox, 19 Johns. (N. Y.) 235, 30 Am. Dec. 635; Beckman v. Shouse, 5 Rawle (Pa.) 179, 28 Am. Dec. 653. There is no presumption that a common carrier which transports merchandise or parcels by messenger holds itself out as a common carrier of money, and if it does not customarily carry money, it is not liable in the absence of notice for the loss of money contained in an envelope delivered to a messenger. White v. Postal Telegraph &c. Co., 25 App. Cas. (D. C.) 364, 4 Am. & Eng. Ann. Cas. 767. A railroad company which does not undertake to carry dogs is not bound to carry a dog. Honeyman v. Oregon &c. R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20.

[52] Higdon v. Louisville & Nashville R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A. (N. S.) 442.

[53] Sutcliffe v. Great Western R. Co. (1910), 1 K. B. 478, 18 Am. & Eng. Ann. Cas. 224 and note; Truax v. Philadelphia &c. R. Co., 3 Houst. (Del.) 233; Ohlen v. Atlanta &c. R. Co., 2 Ga. App. 323, 58 S. E. 511; Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341; Union Express Co. v. Graham, 26 Ohio St. 595.

[54] California Powder Works v. Atlantic & P. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; The Nith, 36 Fed. 86, 13 Sawy. (U. S.) 368.

[55] The Nitro-glycerine Case, 15 Wall. (U. S.) 524, 21 L. ed. 206.

has good ground for believing them of dangerous character, it is his duty to ascertain whether such is the case,[56] and a shipper who delivers explosives or goods of dangerous character to the carrier must inform him of their nature, and, failing to do so, is liable in damages for resultant injuries to the carrier's vehicle or cargo.[57] He may refuse if there is extraordinary danger of the loss of the goods, as from a mob,[58] or, it seems, if, although he has provided means and facilities sufficient to accommodate the business ordinarily to be expected, he finds that for the time being, on account of press of business, he cannot possibly carry the goods offered,[59] as where there is an unusual amount of freight arising from an excessive crop of cotton, greater than the estimates made by the carrier or the crop experts.[60] But if the freight is accepted and the shipper is not notified of the unusual press of business, the carrier is liable for delay,[61] and it is not a defense for failure to carry that the carrier is unable to regain cars sent to other roads carrying freight from the defendant's line, when the carrier had lost control of the cars knowing that the rules for their return were not sufficient to insure return in proper time to handle the business ordinarily to be expected.[62] The carrier who for good cause believes that the person offering the goods is not authorized to deliver them for carriage may refuse to receive

[56] The Nitro-glycerine Case, 15 Wall. (U. S.) 524, 21 L. ed. 206.

[57] Williams v. East India Co., 3 East 192; International Mercantile Marine Co. v. Fels, 170 Fed. 275, 95 C. C. A. 471, 18 Am. & Eng. Ann. Cas. 18 and note; Wellington v. Donner Kerosene Oil Co., 104 Mass. 64; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. ed. 453.

[58] Edwards v. Sherratt, 1 East 604; Phelps v. Illinois Co., 94 Ill. 548; Illinois Central R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Illinois Central R. Co. v. Ashmead, 58 Ill. 487; Illinois Central R. Co. v. Hornberger, 77 Ill. 457; Pearson v. Duane, 4 Wall. (U. S.) 605, 18 L. ed. 447. Or where a strike would prevent forwarding the goods if received. Murphy Hdw. Co. v. Southern R. Co., 150 N. Car. 703, 64 S. E. 873, 22 L. R. A. (N. S.) 1200 and note.

[59] Lovett v. Hobbs, 2 Shower 127; Riley v. Horne, 5 Bing. 217; Helliwell v. Grand Trunk R. of Canada, 7 Fed. 68, 10 Biss. (U. S.) 170; Ocean Steamship Co. of Savannah v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 15 Am. & Eng. Ann. Cas. 1044; Yazoo & Mississippi Valley R. Co. v. Blum, 89 Miss. 242, 42 So. 282, 10 L. R. A. (N. S.) 432, 11 Am. & Eng. Ann. Cas. 272 and note; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Peet v. Chicago & N. W. Ry. Co., 20 Wis. 594, 91 Am. Dec. 446.

[60] Yazoo & Mississippi Valley R. Co. v. Blum, 89 Miss. 242, 42 So. 282, 10 Am. & Eng. Ann. Cas. 272 and note.

[61] Daoust v. Chicago, Rock Island & Pacific R. Co., 149 Iowa 650, 128 N. W. 1106, 34 L. R. A. (N. S.) 637.

[62] St. Louis S. W. R. Co. v. State

them.[63] He may require payment of freight charges in advance, and refuse to carry unless these are paid, for though the law requires him to carry for all it does not require him to carry on credit.[64] It is not necessary, however, for the owner to pay in advance unless demand is made, or unless he knows of a rule of the carrier making such payment imperative.[65] It has been held that it is not discrimination to require prepayment of freight from one shipper, though extending credit to others similarly situated.[66] If the carrier actually accepts for transportation goods which he might have refused, he is held to have waived the grounds of refusal, and to be an insurer as in other cases.[67]

85 Ark. 311, 107 S. W. 1180, 122 Am. St. 33.

[63] Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33.

[64] Elliott R. R. (2d ed.), § 1466; Bastard v. Bastard, 2 Shower 81; Pickford v. Grand Junction R. Co., 8 Mees. & W. 372; Galena & Chicago Union R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Shipper v. Pennsylvania R. Co., 47 Pa. St. 338.

[65] Hutchinson Carriers (3d ed.), § 150; Elliott R. R. (2d ed.), § 1558.

[66] Gamble-Robertson Commission Co. v. Chicago &c. R. Co., 168 Fed. 161, 93 C. C. A. 217, 21 L. R. A. (N. S.) 982n, 16 Am. & Eng. Ann. Cas. 613.

[67] Great Northern &c. R. Co. v. Shepherd, 8 Exch. 30, 14 Eng. L. & Eq. 367, 21 L. J. Ex. 286; Cincinnati, N. O. & T. P. R. Co.'s Receiver v. Webb, 103 Ky. 705, 20 Ky. L. 330, 46 S. W. 11; Porcher v. Northeastern R. Co., 14 Rich. L. (S. Car.) 181; Hannibal &c. R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423; The David & Caroline, 5 Blatch. (U. S.) 266.

CHAPTER X.

BILLS OF LADING.

§ 140. What a bill of lading is.
141. Dual capacity of bill of lading as receipt and contract.
142. Authority to give bill of lading.
143. Operation of bill of lading as receipt.
144. Recitals in bill of lading as to condition or character of goods received.
§ 145. Bill of lading as a contract.
146. Conflict between bill of lading and parol contract.
147. Mutual assent.
148. Transfer of title to goods by transfer of bill of lading.
149. Bill of lading as evidence of title.
150. Bill of lading with draft attached.

§ 140. What a bill of lading is.—The significant feature in the relationship between a shipper and a common carrier of goods is that the carrier is held by law to be the insurer of the goods against loss during the existence of the relation, with the exception of certain perils later discussed.[1] It is not necessary that a bill of lading or any writing should be given to subject him to this liability, but as soon as delivery and acceptance are completed, as seen in a former section, the carrier becomes liable for the goods as an insurer, as well as for the carrying of them according to directions.[2] Usually the carrier, at or about the time of the acceptance of the goods, makes out and delivers to the shipper a bill of lading, or receipt, which is intended to serve as evidence of the transaction between them. No certain form is essential.[3] This writing contains, as a rule, a description of the goods, an acknowledgment of their receipt by the carrier, the names of the consignor and the consignee and the place of consignment, a contract to carry the goods to their destination and

[1] See § 129.

[2] See § 136. Hutchinson Carriers (3d ed.), § 152; Elliott R. R. (2d ed.), § 1415; Missouri, K. & T. R. Co. v. Patrick, 144 Fed. 632, 75 C. C. A. 434; Texas Pac. R. Co. v. Nicholson, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. 566.

[3] Elliott Railroads (2d ed.), § 1415; Hutchinson Carriers (3d ed.), § 154.

deliver them as directed, the terms upon which the goods are carried, a stipulation that the goods are in good condition, and, usually, certain qualifications of the strict liability of the carrier as insurer. In order to bind both parties, such bill must usually be signed by the carrier or his authorized agent, and accepted by the shipper.[4] These bills are usually made out in duplicate or triplicate, and, in case of variance, that issued to the shipper controls.[5]

§ 141. **Dual capacity of bill of lading as receipt and contract.**—A bill of lading is, as is seen from the foregoing enumeration of its usual contents, both a receipt and a contract, and serves both as evidence of the receipt and acceptance of the goods by the carrier and as evidence of the terms of the contract of carriage.[6] Its capacity thus being dual, the rule of evidence applies, that, so far as a bill of lading is a receipt, it may be varied, contradicted, or explained in any way by parol,[7] and proof of delivery may be made by parol, though a receipt was given and is still in existence;[8] so far as it is a contract, its terms may not be varied, or added to by parol,[9] but it may, however, in a proper case, be shown by parol that the contract as expressed in the bill of lading was not the contract of the parties, and never had any binding force.[10] In the present chapter, we shall consider the bill of lading mainly as a receipt, and later discuss it as a contract limiting liability.

§ 142. **Authority to give bill of lading.**—A carrier is not bound by the bill of lading if his agent was not in some way au-

[4] The Brittannia, 87 Fed. 495; Patrick v. Missouri, K. & T. R. Co. (Ind. Terr.), 88 S. W. 330.

[5] Ontario Bank v. Hanlon, 23 Hun (N. Y.) 283.

[6] Planters' Fertilizer Mfg. Co. v. Elder, 101 Fed. 1001, 42 C. C. A. 130; The Tongoy, 55 Fed. 329; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998.

[7] St. Louis &c. R. Co. v. Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17; Elm Staves Case, 21 Fed. 590; Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116; Hazard v. Ill. Central R. Co., 67 Miss. 32, 7 So. 280; Abbe v. Eaton, 51 N. Y. 410.

[8] Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116.

[9] See §§ 145, 146, infra; Wayland's Admr. v. Mosely, 5 Ala. 430, 39 Am. Dec. 335; Louisville &c. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244n; Whitnack v. Chicago &c. R. Co., 82 Nebr. 464, 118 N. W. 67, 19 L. R. A. (N. S.) 1011n, 130 Am. St. 692; Long v. New York &c. R. Co., 50 N. Y. 76.

[10] See §§ 145, 146 infra.

thorized to give such bill. If a bill is given for a greater amount than actually received, by an agent having the authority to give a bill for a certain amount, the carrier may be estopped from showing the true amount, as against an innocent transferee of the bill,[11] but an agent who issues a bill of lading when no goods were actually received has exceeded his authority, since without a delivery of goods there can be no contract to carry, and the carrier is not bound by the bill so issued,[12] even against an innocent transferee or bona fide purchaser.[13] The contrary rule, however, holds in certain states.[14]

§ 143. **Operation of bill of lading as receipt.**—A bill of lading is evidence of the receipt of goods by the carrier, but it may be shown that no goods were received.[15] The recitals in the bill as to the amount of goods received may be contradicted by parol as between the shipper and the carrier,[16] but where the carrier has issued a bill, knowing that the goods may be transferred by its transfer, and the goods are transferred for a consideration by the bill to one who relies upon the statement therein as to the amount, the carrier is usually estopped as against such good faith transferee to show that such was not the true amount,

[11] Smith v. Bedouin Steam Nav. Co. (1896), App. Cas. 70, 65 L. J. P. C. 8; Thomas v. Atlantic Coast Line R. Co., 85 S. Car. 537, 64 S. E. 220, 67 S. E. 908, 34 L. R. A. (N. S.) 1177 and note, 21 Am. & Eng. Ann. Cas. 223.

[12] St. Louis, I. M. & S. R. Co. v. Citizens' Nat. Bank, 87 Ark. 26, 128 Am. St. 17, 112 S. W. 154; Roy v. Northern Pac. R. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, 7 Am. & Eng. Ann. Cas. 728 and note.

[13] Grant v. Norway, 10 C. B. 665; Erb v. Great Western R. Co., 5 Can. Sup. Ct. 179; Union R. & Trans. Co. v. Yeager, 34 Ind. 1; Fellows v. Steamer R. W. Powell, 16 La. Ann. 446; Henderson v. Louisville &c. R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. 582; Baltimore & O. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Sears v. Wingate, 3 Allen (Mass.) 103; National Bank of Commerce v. Chicago, B. & N. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. 566; Louisiana Nat. Bank v. Laveille, 52 Mo. 380; Williams v. Wilmington &c. R. Co., 93 N. Car. 42, 53 Am. Rep. 450n; Dean v. King, 22 Ohio St. 118; Roy v. Northern Pac. R. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, 7 Am. & Eng. Ann. Cas. 728; cases cited in note, 7 Am. & Eng. Ann. Cas. 731; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998.

[14] St. Louis &c. R. Co. v. Larned, 103 Ill. 293; Wichita Sav. Bank v. Atchison &c. R. Co., 20 Kans. 519; Sioux City & P. R. Co. v. Fremont First Nat. Bank, 10 Nebr. 556, 7 N. W. 311, 35 Am. Rep. 488; Batavia Bank v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Brooke v. New York &c. R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235.

[15] See cases cited in § 142.

[16] Bates v. Todd, 1 M. & Rob. (Eng.) 106; Goodrich v. Norris, 1 Abb. Adm. (U. S.) 196, Fed. Cas. No. 5545; Crenshawe v. Pearce, 37

even if there was a mistake.[17] This rule does not, however, apply if no goods have actually been received.[18] The rule is that if it is stipulated that the bill of lading shall be conclusive as to quantity, such stipulation is given effect.[19]

§ 144. **Recitals in bill of lading as to condition or character of goods received.**—Most bills of lading contain a recital that the goods were received in good condition, or apparently good condition, and it is presumed without such a recital that they were in good condition as to external appearance.[20] But even if they are stated to be in good condition, the carrier may show that they were not actually so at the time of shipment, that they were improperly packed, or that they had deteriorated from natural decay before delivery,[21] if a claim is made for damage during transportation. Such a recital as to good condition is only evidence of apparent good condition, for the carrier cannot inspect the packages in order to ascertain whether they are actually in good condition, and can rely only upon outward appearances. Clauses are often inserted in bills of lading to the effect that the weight, contents or value of the goods are unknown, and where such clauses are present, the carrier cannot be held for the stated amount and kind written in as a description.[22] The effect of such a clause seems to be to make the written description of the

Fed. 432, revd. 43 Fed. 803; The Wisconsin v. Young, 3 Greene (Iowa) 268; O'Brien v. Gilchrist, 34 Maine 554, 56 Am. Dec. 676; Meyer v. Peck, 28 N. Y. 590.

[17] Thomas v. Atlantic Coast Line R. Co., 85 S. Car. 537, 64 S. E. 220, 67 S. E. 908, 34 L. R. A. (N. S.) 1177 and note, 21 Am. & Eng. Ann. Cas. 223 and note.

[18] See cases cited in notes 12 and 13.

[19] Mediterranean Steamship Co. v. Mackay (1903), 1 K. B. 297; Sawyer v. Cleveland Iron Co., 69 Fed. 211, 16 C. C. A. 191, 35 U. S. App. 427; The Tongoy, 55 Fed. 329; Merrick v. Nineteen Thousand Five Hundred and Fourteen Bushels of Wheat, 3 Fed. 340; Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. 859; note, 1 Am. & Eng. Ann. Cas., p. 227.

[20] Bond v. Frost, 8 La. Ann. 297; The Zone, 2 Sprague's Dec. (U. S.) 19, 18 Law Rep. 725, 30 Fed. Cas. No. 18220.

[21] Elliott R. R. (2d ed.), § 1420 and cases cited; St. Louis &c. R. Co. v. Neel, 56 Ark. 279, 19 S. W. 963; Hastings v. Pepper, 11 Pick. (Mass.) 41; Hazard v. Illinois Central R. Co., 67 Miss. 32, 7 So. 280; Arend v. Liverpool, N. Y. & P. S. S. Co., 64 Barb. (N. Y.) 118, 6 Lans. (N. Y.) 457; Missouri Pac. R. Co. v. Fennell, 79 Tex. 448, 15 S. W. 693; Nelson v. Woodruff, 1 Black. (U. S.) 156, 17 L. ed. 97; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985.

[22] The Ismeale, 14 Fed. 491, 22 Fed. 559; Matthiessen v. Gusi, 29 Fed. 794; The Seefahrer, 133 Fed. 793; The La Kroma, 138 Fed. 936; Henderson v. Iron Ore, 38 Fed. 36; Lewis v. Gale, 17 La. Ann. 302; Mil-

goods solely a representation of the shipper to the carrier, and the contract therefore, is that the carrier has received certain goods from the shipper, weight, contents, and value unknown, described in a certain manner by the shipper.

§ 145. **Bill of lading as a contract.**—A bill of lading delivered by the carrier and accepted by the shipper is presumed to constitute the contract of carriage, and as such cannot be varied by parol,[23] and the shipper who received it is, in so far as it is a contract, conclusively presumed to have read it and acquiesced in its terms, unless fraud or mistake is shown. If a bill of lading is ambiguous, parol evidence is admissible to remove the ambiguity.[24] It is held inadmissible to vary implied obligations as to which the contract does not speak, but which are implied by law, or arise from the nature of the contract. For instance, where there is more than one route, and none is specified in the bill, the carrier may select any usual and reasonable route, and it cannot be shown by parol that another route was in the minds of the parties,[25] or if no mention is made of the time of delivery by the carrier, it will be presumed that a reasonable time was allowed, and parol evidence will not be allowed to show a different understanding.[26] The bill imports the usual mode of shipping, if there are no contrary specifications, so where the bill was silent in this

ler v. Hannibal & St. J. R. Co., 90 N. Y. 430, 43 Am. Rep. 179; St. Louis &c. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077, 30 Am. & Eng. R. Cas. 88. Where goods were described in the bill of lading as "two bundles of carpet," it was proper to show that the bundles contained other articles than carpet, their appearance suggesting the fact, and all the goods shipped being liable to the same freight rate, and no reduced rate being given. Benson v. Oregon Short Line R. Co., 35 Utah 241, 99 Pac. 1072, 136 Am. St. 1052.

[23] Elliott R. R. (2d ed.), § 1423 and cases cited; Snow v. Indiana, B. & W. R. Co., 109 Ind. 422, 9 N. E. 702; Louisville &c. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244; St. Louis &c. R. Co. v. Cleary, 77 Mo. 634; Turner v. St. Louis &c. R. Co., 20 Mo. App. 632; Hinckley v. N. Y. Cent. & H. R. R. Co., 56 N. Y. 429; The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779; Davis v. Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. 852.

[24] The Wanderer, 29 Fed. 260; Savannah &c. R. Co. v. Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. 87; The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779.

[25] Snow v. Indiana B. & W. R. Co., 109 Ind. 422, 9 N. E. 702; Simkins v. Norwich &c. Steamboat Co., 11 Cush. (Mass.) 102; White v. Ashton, 51 N. Y. 280; Hinckley v. New York Cent. &c. R. Co., 56 N. Y. 429; Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. (U. S.) 276, 19 L. ed. 349.

[26] Central R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. 37; Gulf C. & S. F. R. Co. v. Baugh (Tex. Civ. App.), 42 S. W. 245.

respect, the carrier was not allowed to set up a previous parol agreement to the effect that goods should be stowed on deck, when the usual method of stowage was between decks,[27] even when the shipper's agent saw the goods stowed on deck without objecting.[28]

§ 146. **Conflict between bill of lading and parol contract.** —A subsequent parol agreement may be entered into by the shipper and the carrier, which will have the effect of abrogating, changing, or modifying the contract as set out in the bill of lading.[29] It is generally held that if there has been an oral agreement, and subsequently, before acceptance by the carrier, the shipper accepts, with knowledge, a written bill of lading varying the oral contract, the bill of lading will prevail, in accordance with the general rule that a subsequent written contract merges previous parol agreements.[30] But if such bill of lading is not delivered to the shipper until after the goods have been fully accepted under an oral agreement, the bill is not a part of the contract, which has been fully determined by the acceptance of the goods under the oral agreement.[31] Yet, since a contract once

[27] Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; Shackleford v. Wilcox, 9 La. 33; Creery v. Holly, 14 Wend. (N. Y.) 26; The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779.

[28] Sproat v. Donnell, 26 Maine 185, 45 Am. Dec. 103.

[29] Toledo, St. L. & K. C. R. Co. v. Levy, 127 Ind. 168, 26 N. E. 773; Louisville, N. A. & C. R. Co. v. Craycraft, 12 Ind. App. 203, 39 N. E. 523; Cincinnati &c. R. Co. v. Steele, 140 Ky. 383, 131 S. W. 22, 140 Am. St. 389; Steidl v. Minneapolis & St. L. R. Co., 94 Minn. 233, 102 N. W. 701.

[30] See cases cited under note 23. St. Louis &c. R. Co. v. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. 99; Gulf &c. R. Co. v. Batte (Tex. Civ. App.), 94 S. W. 345.

[31] Snow v. Indiana, Bloomington & Western R. Co., 109 Ind. 422, 9 N. E. 702; Wilde v. Merchants' Dispatch Transp. Co., 47 Iowa 247, 29 Am. Rep. 479; Hendrick v. Boston & A. R. Co., 170 Mass. 44, 48 N. E. 835; Rudell v. Ogdensburg Transit Co., 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415; Waldron v. Fargo, 170 N. Y. 130, 62 N. E. 1077; Guillaume v. General Transp. Co., 100 N. Y. 491, 3 N. E. 489; Wheeler v. New Brunswick &c. R. Co., 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. ed. 341; Stoner v. Chicago &c. R. Co., 109 Iowa 551, 80 N. W. 569; Waltham Mfg. Co. v. New York & Tex. Steamship Co., 204 Mass. 25, 90 N. E. 550. The same principle applies to making of a bill of lading after a charter party is entered into. Burns v. Burns, 131 Fed. 238, 65 C. C. A. 224; Huron Barge Co. v. Turney, 71 Fed. 972; The Iowa, 26 C. C. A. 261, 80 Fed. 933, 52 U. S. App. 199. So the mere receipt by the consignee after loss of a bill of lading limiting liability, not issued on the shipment of the goods, does not estop him from asserting the common-law liability of the carrier. McGregor v. Oregon R. & Nav. Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668.

entered into may be superseded by a new one, if, after an oral agreement is entered into, a bill of lading differing in its terms is delivered to the shipper and his attention called to the differences, or he has knowledge, and expressly or impliedly assents, at least if there be a consideration therefor, the bill will control.[32] This is not true if the assent has been procured by unfair means, as misrepresentation or duress.[33]

§ 147. **Mutual assent.**—If by custom between the parties the carrier issues receipts after the goods have been shipped, this receipt may control as to the rights of the parties.[34] Likewise if a temporary receipt is issued, with the understanding by both parties that a bill of lading will later be issued, the bill is considered to contain the contract.[35] But from the mere fact that the shipper accepts a receipt providing that the goods are received according to the terms of a bill of lading to be issued later, unless the carrier can show clearly that he fairly assented to such, the shipper is not bound by the bill,[36] though it has been held that if it is stated in the receipt that the goods are received subject to the terms of the carrier's bill of lading, for which the receipt is later to be exchanged, the shipper has sufficient notice to be bound by the conditions of the bill.[37] Where the letters passing between the shipper and the carrier set out merely the rates of carriage, and the time within which claims are settled, it is assumed that the parties had in mind the usage and custom of issuing bills of lading, and such bills, when issued, it is held, constitute the contract or a part of the contract.[38] If the shipper accepts a receipt stating that the conditions of transportation are to be found on the back, he usually accepts and is bound by such conditions, and if the condition is that unless the word "order"

[32] The Arctic Bird, 109 Fed. 167; Northern P. Railway Co. v. American &c. Co., 195 U. S. 439, 49 L. ed. 269.

[33] Wabash R. Co. v. Lannum, 71 Ill. App. 84; Southern Pac. R. Co. v. Anderson, 26 Tex. Civ. App. 518, 63 S. W. 1023.

[34] Shelton v. Merchants' Dispatch &c. Co., 59 N. Y. 258.

[35] Washburn-Crosby Co. v. Boston &c. R. Co., 180 Mass. 252, 62 N. E. 590.

[36] Merchants' Despatch &c. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265; Cleveland, C. C. & St. L. R. Co. v. Potts, 33 Ind. App. 564, 71 N. E. 685.

[37] Dunbar v. Charleston & W. C. R. Co., 62 S. Car. 414, 40 S. E. 884.

[38] Merchants' &c. Transportation Co. v. Eichberg, 109 Md. 211, 71 Atl. 993, 130 Am. St. 524.

appears after the name of the consignee, the property may be delivered without production or surrender of the bill of lading, this excuses delivery without such production or surrender.[39] Where an initial carrier receives goods under a shipping order and issues to the consignor a shipping receipt, and the consignor forwards the shipping receipt to the second carrier, which prepares a bill of lading differing from the receipt as to the route of transportation, and said bill of lading is accepted by the consignor without examining it, the bill of lading has been held to control, since it was the only contract between the consignor and the second carrier.[40] An oral agreement to furnish cars at a certain time is merged into a written agreement subsequently entered into which makes no mention of the time when the goods are to be transported.[41] But if the oral agreement has been broken before the goods are shipped, and the shipper then takes a bill of lading for the shipment, he has not lost his right to recover in damages, unless he has expressly relinquished it for a consideration.[42]

§ 148. **Transfer of title to goods by transfer of bill of lading.**—The bill of lading is regarded as the representative of the goods,[43] and title to the goods while they are in the possession of the carrier may be transferred by transferring the bill of lading. A delivery of the bill indorsed with the intention of passing title to the goods operates as a constructive delivery of them.[44] Transfer without indorsement gives to the transferee an

[39] Singer v. Merchants' Despatch Co., 191 Mass. 449, 77 N. E. 882, 114 Am. St. 635.

[40] Waltham Mfg. Co. v. New York &c. Steamship Co., 204 Mass. 253, 90 N. E. 550, 17 Am. & Eng. Ann. Cas. 837.

[41] Helm v. Missouri Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148.

[42] Pittsburgh, C. C. & St. L. R. Co. v. Racer, 10 Ind. App. 503, 37 N. E. 280, 38 N. E. 186; Clark v. Ulster &c. R. Co., 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. (N. S.) 164n, 121 Am. St. 848; McAbsher v. Richmond &c. R. Co., 12 S. E. 892, 108 N. Car. 344; Hamilton v. Western N. C. R. Co., 96 N. Car. 398, 3 S. E. 164; Gulf C. & S. F. R. Co. v. House, 40 Tex. Civ. App. 105, 88 S. W. 1110; Gulf C. & S. F. R. Co. v. Combes (Tex. Civ. App.), 80 S. W. 1045.

[43] Friedlander v. Texas & P. R. Co., 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. 570.

[44] Benj. Sales (7th ed), § 813; Arkansas S. R. Co. v. German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. 160. Generally, as to the rights and liabilities of assignees of bills of lading and for a review and collation of the cases, see monographic note, 105 Am. St. 332-375. Dodge v. Meyer, 61 Cal. 405; Raleigh &c. R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190;

equitable title to the goods.[45] Bills of lading are not negotiable in the sense of commercial paper, only quasi-negotiable.[46] They are assignable, and the assignee gets the same title to the goods that the assignor had,[47] while in the case of negotiable commercial paper, the assignee for value in good faith may get a better title to the money which the paper represents than his assignor had. Since the bill of lading is in general transferable as standing in the place of the goods, the owner may by his conduct in transferring the bill estop himself from later claiming any title to the goods,[48] so that some of the elements of negotiability are represented in a bill of lading. The holder of a fraudulent or fictitious bill of lading, or one the delivery and indorsement of which have been procured by fraud or mistake, has no rights as against the owner, even though the holder be a bona fide purchaser.[49] As we have seen, the general rule is that a carrier is not estopped even against an innocent bona fide transferee of a bill of lading from showing that no goods were in fact received

Ayres v. Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111, 63 Am. St. 376; Louisville & N. R. Co. v. Hartwell, 99 Ky. 436, 18 Ky. L. 745, 36 S. W. 183, 38 S. W. 1041; Robinson v. Stuart, 68 Maine 61; Stone v. Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 344; National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321n; Ratzer v. Burlington &c. R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. 530; Midland Nat. Bank v. Missouri, K. & T. R. Co., 62 Mo. App. 531, affd. 132 Mo. 492, 33 S. W. 521, 53 Am. Rep. 505; Union Pac. R. Co. v. Johnston, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. 540; Hazard v. Fiske, 83 N. Y. 287; Wadham v. Balfour, 32 Ore. 313, 51 Pac. 642; Campbell v. Alford, 57 Tex. 159; The Carlos F. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. 803; Joslyn v. Grand Trunk R. Co., 51 Vt. 92.

[45] Turner v. Israel, 64 Ark. 244, 41 S. W. 806; Merchants' Bank v. Union &c. Transp. Co., 69 N. Y. 373.

[46] Elliott R. R. (2d ed), § 1428 and cases cited; Haas v. Citizens' Bank, 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. 61; National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am St. 321; Stollenwerck v. Thacher, 115 Mass. 224; Friedlander v. Texas & P. R. Co., 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. 570.

[47] Haas v. Citizens' Bank, 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. 61; Haas v. Kansas City &c. R. Co., 81 Ga. 792, 7 S. E. 629; Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa 262, 71 N. W. 255; Alabama Nat. Bank v. Mobile &c. R. Co., 42 Mo. App. 284; Shaw v. Merchants' Nat. Bank, 101 U. S. 557, 25 L. ed. 892.

[48] Gurney v. Behrend, 3 El. & Bl. 622, 633-34, 23 L. J. Q. B. 265; Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998.

[49] Gurney v. Behrend, 3 El. & Bl. 622-34; Henderson v. Louisville &c. R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. 582; Brower v. Peabody, 13 N. Y. 121, 2 Abb. Pr. 211, 11 How. Pr. 492; Dows v. Perrin, 16 N. Y. 325; Decan v. Shipper, 35 Pa. St. 239, 78 Am. Dec. 334; Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892.

or shipped, though the agent issued a bill of lading.[50] In case of duplicate bills of lading, the transferee of one of the bills takes the goods, even as against the original owner who holds the original bill, if that owner has transferred the duplicate with the intention of passing title.[51] Statutes making bills of lading negotiable are not held to give them the characteristics of commercial paper, but only to prescribe the manner by which they may be transferred, without undertaking to change the effect of such transfer,[52] unless it is expressly provided that they shall be negotiable in the same sense as bills of exchange and promissory notes, and the bona fide purchasers for value without notice of such bills are expressly given the title to property represented by them unaffected by the rights of the original owner.[53]

§ 149. Bill of lading as evidence of title.—The consignee named in a bill of lading is presumptively the owner of the goods and the carrier must so consider him unless he has notice to the contrary, and delivery to him without such notice will release the carrier from liability.[54] Taking a bill of lading in the name of the consignee vests apparent title in him;[55] likewise the indorsement of the bill of lading vests apparent title in the transferee.[56] If a person is named in the bill of lading as consignee, transfer of the bill by delivery only, without indorsement,

[50] See cases cited under note 13, this chapter. See note 105 Am. St. 347 et seq.

[51] Glyn Mills Currie Co. v. East & West India Dock Co., 7 App. Cas. 591; First Nat. Bank v. Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. 431; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861.

[52] First Nat. Bank v. Mt. Pleasant Milling Co., 103 Iowa 518, 72 N. W. 689; Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892, construing Missouri and Pennsylvania statutes.

[53] Tiedeman v. Knox, 53 Md. 612.

[54] Hutchinson Carriers (3d ed.), § 177; Elliott R. R. (2d ed.), § 1426; Nebraska Meal Mills v. St. Louis, S. W. R. Co., 64 Ark. 169, 41 S. W. 810, 32 L. R. A. 358, 62 Am. St. 183; Lovell v. Neuman, 192 Fed. 753; Cleveland, C. C. & St. L. R. Co. v. Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480; Sweet v. Barney, 23 N. Y. 335; O'Dougherty v. Boston & W. R. Co. (N. Y.), 1 Thomp. & C. 477; Lawrence v. Minturn, 17 How. (U. S.) 100, 15 L. ed. 58.

[55] Laughlin v. Ganahl, 11 Rob. (La.) 140; Forbes v. Boston &c. R. Co., 133 Mass. 154; Bank of Litchfield v. Elliott, 83 Minn. 469, 86 N. W. 454; Fry v. United States, 3 Wall. (U. S.) 451, 18 L. ed. 197. And it is held that the owner shipping cotton who accepts a bill of lading designating the consignees as shippers and owners is not entitled to assert ownership. St. Louis & S. W. R. Co. v. Gilbreath (Tex. Civ. App.), 144 S. W. 1051.

[56] People v. Midkiff, 71 Ill. App. 141; Peters v. Ballistier, 3 Pick. (Mass.) 495.

will pass apparent title, even if the bill provides for delivery to a certain person, or his order.[57] The consignor who wishes to retain the ownership or control of the goods must give notice to the carrier in order to do so.[58] And if the goods are to be delivered to the order of the consignor on account of the consignee, the carrier should not deliver with the order of the consignor, since this shows that the shipper retains ultimate power of disposition, and the carrier should require the production of the bill of lading indorsed.[59] As the carrier is liable for delivery to the wrong person, he has a right to demand production of the bill of lading properly indorsed, and may refuse delivery because of failure to present a proper bill of lading.[60] However, the carrier's duty is discharged when he delivers the goods to the person lawfully entitled to them, without presentation of the bill of lading,[61] and the demanding of the bill of lading is merely precautionary on the part of the carrier.[62] The general rule is that when a carrier has made a delivery to the person entitled to the goods without requiring the production of the bill of lading, subsequent transfer of the bill will give to the transferee neither title to the goods, nor a right of action against the carrier for delivery without surrender of the bill.[63] If it is expressly stipulated that the goods shall not be delivered except upon surrender of the bill, a carrier who delivers without surrender is liable to any innocent person who is injured by such action.[64] In some

[57] Glidden v. Lucas, 7 Cal. 26; Munroe v. Philadelphia Warehouse Co., 75 Fed. 545, 79 Fed. 999; Allen v. Williams, 12 Pick. (Mass.) 297.

[58] Nebraska Meal Mills v. St. Louis S. W. R. Co., 64 Ark. 169, 41 S. W. 810, 32 L. R. A. 858, 62 Am. St. 183.

[59] Benj. Sales, ch. 6, bk. 2; Elliott R. R. (2d ed.), § 1426 and cases cited in note 77; Arkansas Southern R. Co. v. German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. 160; Furman v. Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. 266.

[60] Hutchinson on Carriers (3d ed.), § 178; Elliott R. R. (2d ed.), § 1426 and note 77.

[61] Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa 262, 71 N. W. 255; Gates v. Chicago, B. & Q. R. Co., 42 Nebr. 379, 60 N. W. 583.

[62] Chicago Packing & Provision Co. v. Savannah &c. R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367, 10 Am. & Eng. R. Cas. (N. S.) 391.

[63] Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa 262, 71 N. W. 255; Albany Nat. Bank v. Lackawanna Transp. Co., 59 App. Div. (N. Y.) 270, 69 N. Y. S. 396, affd. 172 N. Y. 596, 64 N. E. 1123.

[64] Merchants' &c. Bank v. Steamboat Co., 102 Md. 573, 63 Atl. 108; Chesapeake Steamship Co. v. Merchants' Bank, 102 Md. 589, 63 Atl.

states, it is the rule that where a bill without such provision is transferred, and the transferee has taken it in regular course, and the goods have been delivered to the consignee without notice to the transferee, and without the carrier demanding production of the bill of lading, the carrier is liable to the innocent transferee.[65]

§ 150. Bill of lading with draft attached.—Bills of lading frequently have drafts attached by the shipper, and there is often a direction to notify the one on whom the draft is drawn. Ordinarily, such person, though named as consignee, is not entitled to delivery of the property until he pays the draft, and the carrier will be liable for delivery without production of the bill of lading,[66] while a third party, usually a bank, who purchases the draft, has a right to the goods as security until the consignee accepts or pays, and has a right of action against the carrier for delivery without production of the bill.[67] A consignee who has advanced money, or the purchaser of a draft as above, usually has a better title to the goods than a person who claims under a subsequent agreement with an owner who has retained something of the jus disponendi.[68] So where there are duplicate bills in

113; Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. 505.

[65] St. Louis, I. M. & S. R. Co. v. Citizens' Bank of Little Rock, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17; Ratzer v. Burlington R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. 530; Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. 505; Union Pac. R. Co. v. Johnston, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. 540.

[66] Elliott R. R. (2d ed.), §§ 1429a, 1523, 1530 and cases cited; Walters v. Western &c. R. Co., 63 Fed. 391, affd. 66 Fed. 862, 14 C. C. A. 267; Libby v. Ingalls, 124 Mass. 503; North Pennsylvania R. Co. v. Nat. Commercial Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. 266. See also, St. Louis &c. R. Co. v. Allen (Okla.), 120 Pac. 1090, 39 L. R. A. (N. S.) 309 and note.

[67] National Newark Banking Co. v. Delaware &c. R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. 825.

[68] Elliott R. R. (2d ed.), § 1429a; American Nat. Bank v. Henderson, 123 Ala. 612, 26 So. 498, 82 Am. St. 147; Dodge v. Meyer, 61 Cal. 405; Newhall v. Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713; Denver &c. Bank v. Schmidt, 6 Colo. App. 216, 40 Pac. 479; Merchants' Exchange Bank v. McGraw, 76 Fed. 930, 22 C. C. A. 622, 48 U. S. App. 55; Kansas City &c. Bank v. Mt. Pleasant Milling Co., 103 Iowa 518, 72 N. W. 689; Halsey v. Warden, 25 Kans. 128; First Nat. Bank v. Crocker, 111 Mass. 163; Midland Nat. Bank v. Missouri &c. R. Co., 62 Mo. App. 531, affd. 132 Mo. 492, 33 S. W. 521, 52 Am. St. 505; Dows v. Greene, 24 N. Y. 638; Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Commercial Bank v. Pfeiffer, 34 Hun (N. Y.) 624, 108 N. Y. 242, 15 N. E. 372; Schumacher v. Eby, 24 Pa. St. 521; Tilden v. Minor, 45 Vt. 196.

the name of the consignor, and one is sent with the draft, and indorsed, and the other, not indorsed, is sent to the person who is to pay for the goods, the carrier is not justified in delivering the goods upon presentation of the unindorsed duplicate.[69] Nor does a direction to notify a certain person dispense with the production of the bill of lading, for the use of such language shows that the one designated was not regarded as consignee.[70] When the shipper draws a draft on the purchaser for the purchase-price, and gets a bill of lading, indorses the draft, and assigns the bill of lading to a third person for value, the third person has title to goods to the amount advanced, and the consignee must pay this amount in order to get the goods, and cannot hold the indorsee liable on the contract of sale for a shortage in the shipment, or its inferior quality.[71] The carrier's duty in delivery as affected by the bill of lading will be further discussed under the head of delivery.

[69] Hutchinson Carriers (3d ed.), § 188; Elliott R. R. (2d ed.), § 1430; Weyland v. Atchison, T. & S. F. R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. 504n.

[70] Elliott R. R. (2d ed.), § 1427; Libby v. Ingalls, 124 Mass. 503; Union Stockyards v. Westcott, 47 Nebr. 300, 66 N. W. 419, Furman v. Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; National Bank v. Atlantic & C. A. L. R. Co., 25 S. Car. 216; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. 266.

[71] Cosmos Cotton Co. v. First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A. (N. S.) 1173; Central Mercantile Co. v. Okla. State Bank, 83 Kans. 504, 112 Pac. 114, 33 L. R. A. (N. S.) 954; Mason v. Nelson Cotton Co., 148 N. Car. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. 635, overruling Finch v. Gregg, 126 N. Car. 176, 35 S. E. 251, 49 L. R. A. 679.

CHAPTER XI.

DUTIES AND LIABILITIES OF CARRIER.

§ 151. Duty to carry for all.
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153. Duty to furnish sufficient accommodations.
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155. Duty to furnish cars suitable to particular classes of freight.
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176. Liability for delay.
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178. Excuses for delay.
179. Duty to delay under some circumstances.

§ 151. **Duty to carry for all.**—It has been seen that the carrier is under a duty to carry for all within the scope of his vocation, under reasonable regulations, but that he may fix the time and place for receiving, and may usually refuse to carry if he has no facilities, and for certain other reasons.

§ 152. **In general of duties implied in the carrier's contract.**—The carrier is liable as an insurer of the goods carried, and in addition must use reasonable care to protect them from damage, even if his liability be limited by contract. Ordinarily, he may choose the route for transportation, unless it is specified in the contract. He is bound to furnish suitable and sufficient

accommodations, and must furnish cars suitable for the shipment of a particular commodity which he carries. For animals and certain perishable freight, he is under a duty as to care commensurate with the needs of the freight transported. He must transport goods within a reasonable time, without unnecessary delay. In case of disaster or delay, he must use reasonable care to protect the property of the shipper from loss. As was said in a leading case, "A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of the goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight-bills, or by other papers accompanying the shipment."[1] These duties will be discussed more particularly in succeeding sections.

§ 153. Duty to furnish sufficient accommodations.—The carrier must provide facilities sufficient to transport the amount of freight which may be expected ordinarily to be offered for carriage over his route.[2] He impliedly agrees to furnish facili-

[1] Beard v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381.

[2] Hutchinson Carriers (3d ed.), § 495; Elliott R. R. (2d ed.), § 1470. See cases cited under note 59, § 139.

ties on a particular day when request has been made of a duly authorized agent a sufficient time in advance; if he cannot fulfil this agreement, it is his duty to notify the shipper within a reasonable time, and if in the absence of notice the shipper relies upon the vehicles for transportation as being at the specified place at the specified time, the carrier is liable if damage is occasioned.[3] The agreement of an authorized agent of a railroad company to furnish a car to a shipper is a contract valid and binding on both parties, supported by consideration and mutual, not unilateral.[4] The local agent of a railroad company ordinarily has, it is held, implied authority to contract to furnish cars sufficient for the shipper's goods on a certain day, and if the agreement is one within the apparent scope of the agent's authority, it makes no difference if in fact he has instructions to the contrary, and the railroad company is liable for failure to furnish the cars, in accordance with well-known principles of agency.[5] Though under an extraordinary press of business the carrier may refuse to accept goods, yet if he accepts them under such circumstances that he cannot transport them within the time usual in the conduct of his business, and does not inform the shipper of the necessity of delay, he is liable.[6]

Central of Ga. R. Co. v. Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D. 965.

[3] Illinois Cent. R. Co. v. Bundy, 97 Ill. App. 202; Gulf &c. R. Co. v. House, 40 Tex. Civ. App. 105, 88 S. W. 1110; Nichols v. Oregon Short Line R. Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. 778; Ayres v. Chicago & N. W. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226. But the carrier is not liable for loss caused by oranges freezing on the trees, because of failure to transport for hire and deliver in reasonable time boxes for shipping the oranges, there being no contract as to time and the carrier not knowing the oranges would be left on the trees. Williams v. Atlantic Coast L. R. Co., 56 Fla. 735, 48 So. 209, 24 L. R. A. (N. S.) 134n, 131 Am. St. 179. See Di Giorgio Importing &c. Co. v. Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108n.

[4] Clark v. Ulster & Delaware R. Co., 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. (N. S.) 164n, 12 Am. & Eng. Ann. Cas. 883, 121 Am. St. 848.

[5] Baltimore &c. R. Co. v. Tison, 116 Ill. App. 48, 38 N. E. 186; Pittsburg, C. C. & St. L. R. Co. v. Racer, 10 Ind. App. 503, 37 N. E. 280; Wood v. Chicago, M. & St. P. R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861; Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318; Fremont &c. R. Co. v. Waters, 50 Nebr. 592, 70 N. W. 225; McCarty v. Gulf &c. R. Co., 79 Tex. 33, 15 S. W. 164.

[6] Elliott R. R. (2d ed.), § 1471; St. Louis & S. W. R. Co. v. Mitchell (Ark.), 142 S. W. 168, 37 L. R. A. (N. S.) 546; Palmer v. Atchison &c. R. Co., 101 Cal. 187, 35 Pac. 630; Pittsburg, C. C. & St. L. R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853; Daoust v. Chicago R. I. & P. R. Co., 149 Iowa 650; Ayres v. Chicago & N. W. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226.

§ 154. Duty to furnish suitable accommodations.—The carrier's means of transportation must be safe and suitable, and defect in his vehicle is not an excuse for damage to the goods.[7] For instance, the owner of a vessel who holds himself out to be a common carrier engages in the contract implied by law that the vessel is seaworthy and fit for the voyage.[8] A shipper, however, may assent to the use of a defective vehicle,[9] while in certain jurisdictions if the shipper selects a car, the railroad company is not liable for loss caused by a defect in such car.[10] It is generally no excuse to the carrier that the vehicles belonged to another, as to a refrigerator car company,[11] and even a stipulation in the bill of lading that the shipper has accepted the car and found it suitable and sufficient has been held not to free the carrier from the duty to use suitable vehicles.[12] An initial carrier is liable for defective cars, when the damage did not occur until the car was on the connecting carrier's line,[13] and the connecting

[7] Hutchinson Carriers (3d ed.), § 497; Elliott R. R. (2d ed.), § 1472; Illinois Cent. R. Co. v. Hall, 58 Ill. 409; Hawkins v. Great Western R. Co., 17 Mich. 58, 18 Mich. 427; Alabama &c. R. Co. v. Searles, 71 Miss. 744, 16 So. 255; Sloane v. St. Louis &c. R. Co., 58 Mo. 220; Ogdensburg &c. R. Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; cases cited in note 8, post. A carrier is liable for the loss by leakage of flax, where the inside doors of the car were not properly fastened by the shipper, and the carrier's agent, knowing this, closed the outside door, and sealed the car. Duncan v. Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A. (N. S.) 952 and note. A railroad company is liable for the rusting of metal caused by the car having previously been loaded with soda ash. Cleveland, C. C. & St. L. R. Co. v. Louisville Tin & Stove Co., 33 Ky. L. 924, 111 S. W. 358, 17 L. R. A. (N. S.) 1034 and note.

[8] Lyon v. Mells, 5 East 428; Sharp v. Grey, 9 Bing. 457; Camden &c. Transp. Co. v. Burke, 13 Wend. (N. Y.) 611; Propeller Niagara v. Cordes, 21 How. (U. S.) 7, 16 L. ed. 41; The Northern Belle, 9 Wall. (U. S.) 526.

[9] Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Hoosier Stone Co. v. Louisville &c. R. Co., 131 Ind. 575, 31 N. E. 365; Potts v. Wabash, St. L. & P. R. Co., 17 Mo. App. 394.

[10] Carr v. Schafer, 15 Colo. 48, 24 Pac. 873; Frohlich v. Pennsylvania R. Co., 138 Mich. 116, 101 N. W. 223, 110 Am. St. 310, 4 Am. & Eng. Ann. Cas. 1140; Harris v. Northern Ind. R. Co., 20 N. Y. 232; contra, Cincinnati, N. O. & T. P. R. Co. v. Fairbanks, 90 Fed. 467, 33 C. C. A. 611; Louisville &c. R. Co. v. Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. 871.

[11] Cincinnati, N. O. & T. P. R. Co. v. Fairbanks, 90 Fed. 467, 33 C. C. A. 611; Mathis v. Southern R. Co., 65 S. Car. 271, 43 S. E. 684, 61 L. R. A. 824; Louisville & N. R. Co. v. Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. 871; New York, Philadelphia &c. R. Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. 722.

[12] Cincinnati, N. O. & T. P. R. Co. v. Fairbanks, 90 Fed. 467, 33 C. C. A. 611. It is held that the carrier cannot devolve upon the shipper the duty of inspecting the car furnished. Blatcher v. Philadelphia, Baltimore &c. R. Co., 31 App. (D. C.) 385, 16 L. R. A. (N. S.) 991.

[13] St. Louis, I. M. & S. R. Co. v.

carrier is also liable.[14] If proper care of the goods demands, the carrier must inspect his vehicles while in transit.[15] Although a bill of lading may provide that goods are carried at the owner's risk of fire, yet the carrier must use appliances which are reasonably safe against fire.[16]

§ 155. **Duty to furnish cars suitable to particular classes of freight.**—The carrier must furnish vehicles and accommodations suitable for particular classes of freight which he undertakes to carry, according to the needs of the freight, especially where he carries animals or perishable freight.[17] So, it is held, the carrier must provide a refrigerator car for butter in hot weather,[18] or perishable fruit in winter,[19] or, in any instance, cars specially adapted to the transportation of perishable fruit,[20] must ice refrigerator cars properly during transportation,[21] must furnish a ventilated car for dried apples,[22] and a carrier of milk must pro-

Marshall (Ark.), 86 S. W. 802; Bloomington &c. R. Co. v. Strain, 81 Ill. 504; Alabama &c. R. Co. v. Searles, 71 Miss. 744, 16 So. 255; Texas Cent. R. Co. v. O'Loughlin (Tex. Civ. App.), 84 S. W. 1104; Ogdensburg &c. R. Co. v. Pratt, 89 U. S. 123, 22 L. ed. 827.

[14] Shea v. Chicago, R. I. & P. R. Co., 66 Minn. 102, 68 N. W. 608; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19.

[15] Ruppel v. Allegheny Valley R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. 666.

[16] Levering v. Union Transp. & Ins. Co., 42 Mo. 88, 97 Am. Dec. 320; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

[17] See cases following, and for a general list of cases thus holding, see note 15 Am. & Eng. Ann. Cas. 144.

[18] Beard v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381.

[19] Merchants' Dispatch & Transp. Co. v. Cornforth, 3 Colo. 280. But a carrier is not negligent who follows a well-known custom not to change ventilators on cars in which fruit is shipped unless shipper so instructs, though it causes the freezing of the fruit. Schwartz v. Erie R. Co., 128 Ky. 22, 106 S. W. 188, 15 L. R. A. (N. S.) 801 and note.

[20] St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317n, 118 Am. St. 58.

[21] St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. 58; Taft Co. v. American Exp. Co., 133 Iowa 522, 110 N. W. 897, 10 L. R. A. (N. S.) 614, 119 Am. St. 642. A carrier who contracts to ice cars for tomatoes is not excused for failure by a rule of the company not to ice unless 600 pounds of ice can be put in the car tank. Orem Fruit & Produce Co. v. Northern Cent. R. Co., 106 Md. 1, 66 Atl. 436, 124 Am. St. 462. The carrier must ice fruit if needed, although the shipper knew it was not properly iced before shipping, but had no opportunity to remedy this and thought the shipment would complete the journey safely. Johnson v. Toledo &c. R. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. 464.

[22] F. D. Forrester v. Southern R. Co., 147 N. Car. 553, 15 Am. & Eng. Ann. Cas. 143 and note, 61 S. E. 524, 18 L. R. A. (N. S.) 508, and note. In this case it was held that it was immaterial that the shipper knew the character of car to be used.

vide reasonable facilities, including proper cars, and, it seems, a caretaker during transportation.[23] Certain goods must not be carried on open cars, as cotton through a district where fires are raging,[24] or oil, exposing it to the sun and destroying it.[25]

§ 156. **Duty to show no preference.**—The common carrier, as a general rule, must give no preferences, show no favors, or make no discriminations in favor of one who offers goods to ship over another who offers. Where the conditions and circumstances are the same, the carrier cannot send one's goods sooner than another's, cannot accept one's and refuse another's without good reason, nor give to one better accommodations than to another.[26] Sometimes, however, a difference in the situation as to the carrier justifies a difference in treatment, so a railroad company may furnish cars under one rule to those who load on their own tracks from a tipple, and under another to those who load on the company's tracks from a wagon.[27] Some cases hold that a railroad is not compelled to give to one express company equal facilities and accommodations with those furnished to another,[28] but many authorities hold that a railroad company cannot discriminate between express companies[29] on the ground that, being common carriers, they owe an equal duty to each citizen. The United States Supreme Court has held that, as to interstate commerce, railroads are not obliged to furnish to all independent express companies equal facilities, since neither by usage nor common law are they required to do so, nor to do more than to furnish to the general public reasonable express accommodations.[30]

[23] Baker v. Boston & M. R. Co., 74 N. H. 100, 65 Atl. 386, 124 Am. St. 937, 12 Am. & Eng. Ann. Cas. 1072.

[24] Insurance Co. of North America v. St. Louis, I. M. & S. R. Co., 3 McCrary (U. S.) 233.

[25] Grand Trunk R. Co. v. Fitzgerald (Can.), 5 Can. Sup. Ct. 204.

[26] Elliott R. R. (2d ed.), §§ 1467, 1468 and cases cited; Hutchinson Carriers (3d ed.), § 512; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; New England Exp. Co. v. Maine Cent. R. Co., 57 Maine 188, 2 Am. Rep. 31; Hillsdale Co. v. Pennsylvania R. Co., 229 Pa. St. 61, 78 Atl. 28, 140 Am. St. 700.

[27] Choctaw &c. R. Co. v. State, 73 Ark. 373, 84 S. W. 502, 92 S. W. 26.

[28] Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Louisville N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. 542.

[29] New England Exp. Co. v. Maine Cent. R. Co., 57 Maine 188, 2 Am. Rep. 31; McDuffee v. Portland & R. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Sanford v. Railroad Co., 24 Pa. St. 378, 64 Am. Dec. 667.

[30] Express Cases, 117 U. S. 1, 29 L. ed. 491, 6 Sup. Ct. 542, 628.

One express company may use the facilities of another express company only on the same terms as the general public, and not in such a way as to interfere with the other company's business.[31] A carrier may not discriminate between preceding connecting carriers, but must carry for them on the same terms as the general public.[32] However, as to succeeding connecting carriers, the first carrier may select whatever ones he wishes in the absence of contract.[33] All shippers of the same kind of goods applying for cars at the same time at the same station have equal rights, and the carrier has no right to favor one.[34] There is some conflict in the cases as to whether a railroad carrier is obliged to transport the cars of other railroad companies, the better view being that it must,[35] but some cases hold that the railroad company can compel a transfer of the goods into its own cars before carrying them.[36] Discrimination in rates will be treated under the head of compensation. Under the common law, the carrier might to a certain degree discriminate in rates, that is, he might in each case charge a reasonable compensation depending upon the particular circumstances, and this does not imply absolute uniformity of rates, but, instead, that there shall be no unjust discrimination.[37]

[31] Hutchinson Carriers (3d ed.), § 518, citing Johnson v. Dominion Exp. Co., 28 Ont. 203.

[32] Hutchinson Carriers (3d ed.), § 519; Elliott R. R. (2d. ed.), § 1394; Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811. See §§ 247-253, post.

[33] St. Louis Drayage Co. v. Louisville &c. R. Co., 65 Fed. 39; Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185.

[34] Great Western R. Co. v. Burns, 60 Ill. 284; Messenger v. Pennsylvania R. Co., 7 Vroom (N. J.) 407, 13 Am. Rep. 457; Nicholas v. Oregon Short Line R. Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. 778. A carrier may not refuse to carry liquors into a state where statute has made such an act unlawful. Louisville &c. R. Co. v. Cook Brewing Co., 172 Fed. 117, 96 C. C. A. 322.

[35] See Elliott R. R. (2d ed.), § 1395, approving the rule as a reasonable one which would promote the interests of commerce. Peoria &c. R. Co. v. Chicago, R. I. & P. R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; Burlington &c. R. Co. v. Dey, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436n, 31 Am. St. 477, 45 Am. & Eng. R. Cas. 391; New England Exp. Co. v. Maine Cent. R. Co., 57 Maine 188, 2 Am. Rep. 31.

[36] Little Rock &c. R. Co. v. St. Louis &c. R. Co., 59 Fed. 400, affd. 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192; Oregon Short Line &c. R. Co. v. Northern &c. R. Co., 51 Fed. 465, 61 Fed. 158.

[37] Elliott R. R. (2d. ed.), § 1467, and cases cited; Hutchinson Carriers (3d ed.), § 521, and cases cited.

§ 157. Duty as to manner of carriage.—Especially in case of carriage by sea, the safety of the goods depends upon the manner of stowage, and the carrier must use reasonable care, or show a compliance with established usage in the manner of stowage.[38] As was said in a preceding section, a clean bill of lading entitles the shipper to stowage under deck, and goods stowed on deck without consent of the shipper, though lost by perils of the sea, are not considered as lost by the act of God, nor as lost by the perils of sea which excuse the carrier, unless it can be clearly shown that the manner of stowage did not affect the loss.[39] In the absence of contract, the law implies that the goods shall be stowed below deck, as much as if such condition were expressly stated.[40] However, an established usage may permit the carrier to stow the goods on deck, or even make it his duty so to do.[41] Or if it is necessary to the safety of a certain kind of goods that they should be carried on deck, the shipowners are liable if they are damaged by being stowed below, as in the case of nuts shipped from San Francisco to New York.[42] If the shipper's goods are damaged by other goods stored in the hold of the ship, the carrier is generally liable, as where flour is damaged by kerosene,[43] or goods are damaged by other goods received in bad condition.[44] The rule that goods must be stowed under deck applies only to sailing vessels upon the seas and great lakes, and not to steam vessels, or vessels upon inland waters,[45] which are subject to the general rules applicable to land carriers, with the one exception that as fires are peculiarly liable to occur on inland steamboats,

[38] Hills v. Mackill, 36 Fed. 702; The Thomas Melville, 31 Fed. 486; Baxter v. Leland, 1 Blatchf. (U. S.) 526, Fed. Cas. No. 1125.

[39] The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779; The Rebecca, 1 Ware (U. S.) (188) 187, Fed. Cas. No. 11619.

[40] The New Orleans, 26 Fed. 44; Crooks v. The Fanny Skolfield, 65 Fed. 814; Creery v. Holly, 14 Wend. (N. Y.) 26; The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779.

[41] Milward v. Hilbert, Ad. & El. (N. S.) 120 (live animals); Da Costa v. Edmunds, 4 Camp. 141 (oils); Brown v. Cornwell, 1 Root (Conn.) 60 (live animals); Tower Co. v. Southern Pac. R. Co., 184 Mass. 472, 69 N. E. 348 (oils).

[42] The Star of Hope, 17 Wall. (U. S.) 651, 21 L. ed. 719.

[43] The Thames, 61 Fed. 1014, 10 C. C. A. 232, 8 U. S. App. 580.

[44] The Gloaming, 46 Fed. 671; Brousseau v. Ship Hudson, 11 La. Ann. 427; Cranwell v. Ship Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190; The Bark Col. Ledyard, 1 Sprague's Dec. (U. S.) 530.

[45] Gillett v. Ellis, 11 Ill. 579; Harris v. Moody, 30 N. Y. 266, 86 Am. Dec. 375.

their freight must be loaded so as to avoid danger from such a source if possible, and if the goods are negligently exposed to fire, the carrier loses the benefit of the bill of lading exemption of liability for loss by fire.[46] A railroad carrier is likewise liable for loss occasioned by its failure to properly stow goods.[47]

§ 158. Duty to obey shipper's directions.—The implied condition in contracts of carriage is that the goods will be conveyed and stowed in the manner customary in their business, which may be proved as a usage,[48] but if the goods are accepted to be carried according to particular directions of the shipper, the general rule is that these directions control over established usage, and the carrier is liable as an insurer for loss caused by failure to follow the directions, and loses the benefit of any contract limitations of liability.[49] So if a case is marked "Glass. With care. This side up," this is a sufficient notice to the carrier of the manner in which the case can be carried safely,[50] or if crates of roofing are marked "Lay flat."[51] Where a horse was carried in an open car, when the owner had directed him to be carried in a closed car, the company was charged with damages occasioned by cold weather and exposure.[52] Where goods were to be forwarded from the carrier's destination by a certain line of boats, whose agent refused to receive them, and the carrier sent them by a barge, from which they were lost, the original carrier was held liable for failure to obey directions, the court holding that upon the agent's refusal the carrier should have notified the shipper for further instructions, or placed the goods in a ware-

[46] The New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

[47] Hutchinson Carriers (3d ed.), § 610.

[48] Northern Pac. R. Co. v. Kempton, 138 Fed. 992, 71 C. C. A. 246; Milny v. Chicago, M. & St. L. P. R. Co., 98 Iowa 188, 67 N. W. 276; Shelton v. Merchants' Despatch Transp. Co., 59 N. Y. 58, 48 How. Pr. (N. Y.) 257.

[49] Elliott R. R. (2d ed.), § 1490; Streeter v. Horlock, 1 Bing. 34; Merchants' Despatch Transp. Co. v. Kahn, 76 Ill. 520; Colbath v. Bangor &c. R. Co., 105 Maine 379, 74 Atl. 918, 134 Am. St. 569; Johnson v. New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; United States Exp. Co. v. Kountz, 8 Wall. (U. S.) 342, 19 L. ed. 457.

[50] Hastings v. Pepper, 11 Pick. (Mass.) 41.

[51] Colbath v. Bangor &c. R. Co., 105 Maine 379, 74 Atl. 918, 134 Am. St. 569.

[52] Sager v. Portsmouth &c. R. Co., 31 Maine 228, 50 Am. Dec. 659. See, however, and compare Colsch v. Chicago, M. & St. P. R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013n, Ann. Cas. 1912C, 915 and note.

house.[53] Yet if emergency requires for the safety of the goods, the carrier may disregard instructions.[54] And if injury occurs because the shipper's directions were followed, the carrier is not chargeable with the loss.

§ 159. Carrier must choose safest route where more than one.—The carrier must generally transport by the usual direct route.[55] He may ordinarily choose the route where there are more than one, if both are equally safe.[56] When a carrier knowingly chooses a dangerous route, instead of a safe one, he is liable for injury to the goods caused by such known danger, as where gold dust taken by a quicker route through Missouri, known to be dangerous, which might have been carried by a slower, safe route through Iowa, was lost by robbery,[57] or again, where the usual route was obstructed temporarily, and the carrier, without notifying the shipper, sent oranges over a road where at that season frosts were likely to occur, and the oranges were damaged by frost.[58] If the carrier's option as to choice of routes is not exercised in the interest of the shipper, but to his disadvantage, it may be regarded as a breach of the contract.[59] If there is tempestuous weather, or if there are unusual dangers

[53] Johnson v. New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416.

[54] Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Empire State Cattle Co. v. Atchison R. Co., 129 Fed. 480, 135 Fed. 135, affd. 147 Fed. 457, 77 C. C. A. 601, and 210 U. S. 1, 5 L. ed. 931, 28 Sup. Ct. 607; Regan v. Grand Trunk R. Co., 61 N. H. 579; Johnson v. New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416.

[55] Denver &c. R. Co. v. DeWitt, 1 Colo. App. 419, 29 Pac. 524; Merchants' Despatch Transp. Co. v. Kahn, 76 Ill. 520; Powers v. Davenport, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; United States Exp. Co. v. Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457.

[56] Simkins v. Norwich & N. L. Steamboat Co., 11 Cush. (Mass.) 102; Glover v. Cape G. &c. R. Co., 95 Mo. App. 369, 69 S. W. 599; White v. Ashton, 51 N. Y. 280; Hinckley v. N. Y Cent. &c. R. Co., 56 N. Y. 429; Empire Transp. Co. v. Wallace, 68 Pa. St. 302, 8 Am. Rep. 178; Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481. Where there are two routes the carrier is not liable for injury caused by following its usual and customary route, although the injury might have been prevented by following a shorter route. H. S. Emerson Co. v. Reunis, 65 Wash. 513, 118 Pac. 631, 37 L. R. A. (N. S.) 222 and note.

[57] United States Express Co. v. Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457.

[58] Pierce v. Southern Pac. R. Co., 120 Cal. 156, 52 Pac. 302, 47 Pac. 874, 40 L. R. A. 350.

[59] Stewart v. Comer, 100 Ga. 754, 28 S. E. 461, 62 Am. St. 353; Blitz v. Union Steamboat Co., 51 Mich. 558, 17 N. W. 55.

attending the usual route, it may become the duty of the carrier to deviate therefrom.[60]

§ 160. Special duties arising under special contract—Effect of deviation from contract.—A carrier who has made a contract to carry in a particular manner or at or within a certain time, is usually held strictly to its terms, and any deviation therefrom will deprive him of the benefit of contract limitations of liability.[61] Where goods to be shipped by a particular vessel were sent on another of the same line, which was lost, the carrier had to answer.[62] An express stipulation of this kind may not be varied by usage or custom.[63] A carrier who contracts to carry by land is liable for loss if he carries by water. If he contracts to carry on a steam vessel and carries by a sailing vessel, or if he contracts to carry by "all rail" and for a portion of the distance ships by steamboat, he has so failed to comply with the contract as to lose the benefit of a clause exempting him from liability for loss by fire, when the goods were burned in his depot.[64] One who contracted to carry by all rail from Cincinnati to New York, and who put the goods on a steamer at Baltimore, was liable for the loss occasioned by the wrecking of the steamer.[65] Where there was a contract to ship without change of cars, and a change of cars caused injury, the carrier was held liable.[66] Instances of this kind might be multiplied greatly.

§ 161. Construction of clauses permitting delay or deviation.—Sometimes the printed general form of contract used

[60] Phelps v. Hill (1891), 1 Q. B. 605, 60 L. J. Q. B. 382.

[61] Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481; Missouri, K. & T. R. Co. v. Leibold (Tex. Civ. App.), 55 S. W. 368. Where the contract was that horses were to be carried by one train and the carrier sent them by another, he abandoned his special contract, and was thus deprived of the right to benefit by a clause fixing an agreed value in case of loss. McKahan v. American Exp. Co., 209 Mass. 270, 95 N. E. 785, 35 L. R. A. (N. S.) 1046. See note in 35 L. R. A. (N. S.) 1046 to McKahan v. American Exp. Co., and cases cited therein.

[62] Goodrich v. Thompson, 44 N. Y. 324.

[63] Louisville & C. Packet Co. v. Rogers, 20 Ind. App. 594, 49 N. E. 970.

[64] Maghee v. Camden &c. R. Co., 45 N. Y. 514, 6 Am. Rep. 124.

[65] Bostwick v. Baltimore & O. R. Co., 45 N. Y. 712.

[66] Stewart v. Merchants' Despatch Transp. Co., 47 Iowa 229, 29 Am. Rep. 476; Felton v. McCreary &c. Live Stock Co., 22 Ky. L. 1058, 59 S. W. 744.

contains words which would permit of considerable deviation, but these are ordinarily construed in reference to the main object of the particular contract of shipment. In the leading case there was a charter party to carry oranges from Malaga to Liverpool, and the ship took on cargo also at a port 350 miles from Malaga, and it was held that the carrier was not justified in the deviation by certain general printed words giving the liberty to proceed to and stay at any port or ports in any rotation in certain countries and regions named, but that this liberty granted was only such as was consistent with the main object of the contract.[67] Neither does a clause reserving the right to tow and assist vessels in all situations justify unnecessary deviation in taking a vessel for salvage purposes to a port not the most reasonably accessible.[68] If the shipper miscontrues the bill of lading, and thereby suffers loss, the carrier is not liable.[69]

§ 162. **Contracts to carry within certain time.**—It has often been held that a carrier who agrees to carry to a certain point within a certain time will be held absolutely to his contract, and will be liable for loss occasioned by his failure so to do, even if it were absolutely impossible for him to have carried it out, or if inevitable accident prevented, for he might have contracted against liability in such an event.[70] A carrier who undertakes to carry goods in a certain time to a port which he knows is block-

[67] Glynn v. Margetson, L. R. (1893) App. Cas. 351, 62 L. J. Q. B. 466.

[68] Schwazchild v. National Steamship Co., 74 Fed. 257.

[69] Where metal was to be shipped by a certain steamship, but the bill provided that if the goods should be prevented from going in such steamship, the carrier should have liberty to forward them by a succeeding steamship, and because of preference given to perishable freight, there was no room for the metal in the first ship, and it was sent by the next one and totally lost, and the libelants had insured the goods as on the first ship and did not know until after the loss that they had not gone on it, the shippers could not recover from the carrier, the court holding that they were mistaken if they relied upon the contract as an absolute one to carry the goods upon the first ship. The Kansas, 87 Fed. 766; The Brittannia, 87 Fed. 495.

[70] Hadley v. Clarke, 8 T. R. 259, 4 R. R. 641; Chicago & A. R. Co. v. Thrapp, 5 Ill. App. 502; Stoner v. Chicago G. W. R. Co., 109 Iowa 551, 80 N. W. 569; Ruddell v. Ogdensburg Transit Co., 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415; Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 371, 41 Am. Rep. 318; Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Place v. Union Exp. Co., 2 Hilton (N. Y.) 19. This rule was applied in a case where a steamboat was to tow a raft and entered into a contract to begin the service in the morning of a certain day, but altered its voyage to such an extent

aded, cannot set up the blockade as an excuse.[71] Where a carrier made a contract to carry goods from New York to Independence, Missouri, in twenty-six days, or to pay ten cents per hundred pounds of freight for each day's delay beyond that time, and a freshet rendered a canal over which he usually transported goods impassable, and several weeks' delay resulted, the carrier was liable on his covenant, though the bill of lading excepted him from liability for unavoidable accidents.[72] The carrier is not liable for delay occasioned by the shipper in not furnishing the goods for transportation within a reasonable time for loading upon the carrier's vehicle.[73] If the carrier receives goods which he agrees not to forward until a certain time, he is charged with the loss arising from his shipping the goods before that date.[74]

§ 163. Care of goods in emergencies.—The general rule is that the carrier contracts to carry the goods safely, and whenever, because of accident or for any other reason, the goods become in a situation or condition which requires special attention, the carrier must generally be held to stand in the place of their owner, and must do for them all that a person of ordinary prudence and care could reasonably be expected to do to prevent further damage and preserve them, and there may be a situation in which he must incur expense to save the goods, if justified by their value.[75] Thus, where coffee in barrels and boxes carried in a

that it did not take on the raft until evening, and, a storm arising, the raft was lost, and the steamboat owner was held liable on the ground that if the service had been commenced in time, the raft would have reached its destination before the storm. Parmalee v. Wilks, 22 Barb. (N. Y.) 539.

[71] Medeiros v. Hill, 8 Bing. 231.

[72] Harmony v. Bingham, 2 Kern. (N. Y.) 99, 1 Duer (N. Y. Super. Ct.) 209. Mr. Hutchinson, in his work on Carriers, argues that since destruction of the goods by the act of God or the public enemy will excuse the carrier from delivery at all, even if he has contracted to deliver within a certain time (Gage v. Tirrell, 9 Allen (Mass.) 299), a prevention of delivery on time by the same dangers should excuse him, unless his contract can be construed as a contract of insurance that they will be carried by a certain time if not destroyed by the act of God or the public enemy, or excepted dangers. Hutchinson Carriers (3d ed.), § 627.

[73] Fowler v. Steam Co., 87 N. Y. 190.

[74] Campion v. Canadian Pac. Railway Co., 43 Fed. 775, 11 L. R. A. 128.

[75] Hutchinson Carriers (3d ed.), §§ 645, 646; American Exp. Co. v. Smith, 33 Ohio St. 511; Propeller Niagara v. Cordes, 21 How. (U. S.) 7, 16 L. ed. 41. See Pine Bros. v. Chicago, &c. R. Co. (Iowa), 133 N. W. 128, 39 L. R. A. (N. S.) 639 and note, considering the duty of a carrier to hasten shipment or take other precaution to prevent loss threatened without any antecedent fault on its part.

barge became wet from an accident, it was the carrier's duty to open the boxes and attempt to dry the coffee,[76] likewise where bales of furs carried on a steamboat became wet, the carrier should have unpacked them and dried them,[77] and where the ice melted on dressed poultry because of delay, and the same was spoiled by the heat, the carrier, who had with full understanding of the situation done nothing to save the freight, was liable for the loss.[78] Again where a wine cask leaked, and the carrier, knowing it, did nothing to prevent it, and a large quantity was lost,[79] and where the carrier's servants permitted thieves to carry off the contents of cars without opposing them,[80] and where beans became wet by a leak of the vessel, and the master put back into port, but did not unload the beans and dry them[81]—in each instance the carrier was liable. Yet the carrier is not bound to suspend his voyage to care for the goods, and where wheat carried on a river steamboat was wet by the waves, the carrier, who had the goods of many owners on board, was under no duty to stop and dry the wheat of one of them.[82] Sometimes, in the case of accident, the carrier should ship perishable goods by other means, the expense of such transportation, however, being charged to the shipper.[83] Although a carrier must not give preferences in shipping, yet, of goods contracted to be carried, he may first load and carry that which is perishable,[84] on the ground that the perishable goods require such care. It is always an excuse that a preference was given to the saving of human life rather than to the care of goods shipped.[85]

[76] Bird v. Cromwell, 1 Mo. 81, 13 Am. Dec. 470.

[77] Choteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 602.

[78] Peck v. Weeks, 34 Conn. 145.

[79] Beck v. Evans, 16 East 244.

[80] Lang v. Pennsylvania R. Co., 154 Pa. St. 342, 26 Atl. 370, 20 L. R. A. 360, 35 Am. St. 846.

[81] Notara v. Henderson, L. R. 5 Q. B. 346 (Exch. Ch.), L. R. 7 Q. B. 225.

[82] Steamboat Lynx v. King, 12 Mo. 272.

[83] Propeller Niagara v. Cordes, 21 How. (U. S.) 7, 16 L. ed. 41. In some states the statute makes it the duty of a carrier to sell perishable freight upon the consignee's refusal to receive it. Chesapeake R. Co. v. Saulsberry, 126 Ky. 179, 103 S. W. 254, 12 L. R. A. (N. S.) 431n.

[84] Great Western R. Co. v. Burns, 60 Ill. 284; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Tierney v. New York Cent. R. Co., 10 Hun (N. Y.) 569, 67 Barb. (N. Y.) 538, affd. 76 N. Y. 305; Peet v. Chicago & N. W. R. Co,, 20 Wis. 594, 91 Am. Dec. 446.

[85] Pennsylvania R. Co. v. Fries, 87 Pa. St. 234.

§ 164. **Carrier's liability for loss.**—The common carrier's liability, imposed by law, based upon considerations of public policy, is that of an insurer of the goods carried against loss from all sources, except the loss be occasioned by the act of God, or the public enemy, the act of the shipper, public authority, or the inherent nature of the goods.[86] This liability may be restricted by contract to a certain degree, likewise may be enlarged by contract, as we shall see in a later chapter. Unless his liability has been enlarged by contract, the carrier may excuse himself from answering in damages for loss to goods carried by showing that the loss was caused by one of the general exceptions.

§ 165. **Duration of extraordinary liability.**—As has been seen, the relation of carrier begins when the goods have been accepted for immediate transportation.[87] In general, it terminates when the goods have been delivered to the consignee,[88] but during the time it exists, the carrier is liable as an insurer. In the case of goods received for shipment at a later date, however, liability does not arise until the time of shipping, the carrier meantime being liable only as a warehouseman;[89] and in case of the delivery not being made to the consignee within a certain time, under certain circumstances, the carrier may become liable only as a warehouseman.[90] This subject will be further discussed under the head of delivery.

§ 166. **Extent of carrier's liability.**—While acting as a warehouseman, the carrier's liability is that of an ordinary bailee, and he is held to only an ordinary and reasonable degree of diligence in caring for the goods.[91] While the relation of carrier exists, he is, as we have said, an insurer against all loss which does not arise from excepted perils. It thus becomes important to ascertain just what the courts have considered these generally excepted perils to include.

[86] Hutchinson Carriers (3d ed.), § 265; Elliott R. R. (2d ed.), § 1454; Cownie Glove Co. v. Merchants' Dispatch Transp. Co., 130 Iowa 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060, 114 Am. St. 419.

[87] See ante, §§ 131-136.

[88] See post, § 227 et seq.

[89] See ante, § 131 et seq.

[90] See post, § 238.

[91] Elliott R. R. (2d. ed.), §§ 1463, 1464, and cases cited.

§ 167. **What is considered the act of God.**—It is agreed that the carrier is not liable for loss proximately caused by the act of God, without human intervention,[92] but the courts differ as to what is an act of God. One line of authority would hold that the act of God is any inevitable or unavoidable accident, when such accident is not brought about by human agency, nor by the carrier's fault or negligence, a misfortune against which no skill or watchfulness could guard, which must, in the absence of human agency, be ascribed to vis major, the act of God.[93] Among accidents held to be acts of God in this view of the subject are a snag lodged in the usual channel of a river by a freshet,[94] or a hidden and unknown rock in the sea.[95] Another line of authorities restricts the meaning of the term to a violent disturbance of the elements, such as a storm, earthquake, or flood, which immediately causes the disaster, or any extraordinary disturbance of such a character in its vastness that an act of man cannot avoid it. So in this view accidents caused by something in existence, or by quiet change in the physical world, are not acts of God, for these are not in themselves causes of danger, but causes which might have been avoided if known, and a loss caused by them is in part by human agency.[96] So it will be seen that the difference in the reasoning is largely a difference as to what may be considered human agency, or what acts ought to have been foreseen by humans as likely, and guarded against. A sudden cessation of wind, which caused a sailing vessel to run aground, has been held an act of God,[97] likewise a sudden gust

[92] Hutchinson Carriers (3d ed.), § 274; Elliott R. R. (2d ed.), § 1455; Forward v. Pittard, 1 T. R. 27; Smith v Shepherd, Abbott Shipping, p. 383.

[93] Hutchinson Carriers (3d ed.), § 270; Elliott R. R. (2d ed.), § 1455. This view is taken by Judge Story. Story on Bailments (9th ed.), §§ 489, 490, 511; and Chancellor Kent, 2 Kent's Com. 597. It is said in Hays v. Kennedy, 41 Pa. St. 378, by Lowrie, C. J., that the more modern, narrower doctrine was introduced by Lord Mansfield in Forward v. Pittard, 1 T. R. 27.

[94] Smyrl v. Niolon, 2 Bailey (S. Car.) 421; Faulkner v. Wright, Rice (S. Car.) 107.

[95] Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235.

[96] Hutchinson Carriers (3d ed.), § 271; Elliott R. R. (2d ed.), § 1455. See Ferguson v. Southern R. Co. (S. Car.), 74 S. E. 129.

[97] Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200. It has been said that this decision is the "most extraordinary version of the principle on which a common carrier is discharged from liability that the books contain, and upon the authority of later cases, may confidently be pronounced to be wrong." Am. Notes to Coggs v. Bernard, 2 Ld. Raym. 909, in Smith's Ld. Cas. (7th ed.), p. 417.

of wind,[98] and the freezing of canals and rivers.[99] Also among accidents which have been held to be acts of God, within the meaning of the exception from the carrier's liability, are a sudden flood or inundation or freshet, at least if of unprecedented occurrence,[1] a sudden, unusual and unexpected earthquake,[2] an unusually heavy snowstorm, such as to obstruct trains,[3] an unprecedented wind, strong enough to blow a railroad car from the track,[4] a hurricane at sea, or a tornado.[5] A fire, unless caused by lightning, is not an act of God,[6] since originated by human agency, nor a boiler explosion,[7] nor a collision,[8] nor a landslide.[9] A steam carrier is no less liable for loss by fire because fire is used to furnish motive power.[10] Nor is it an act of God, according to one view, when an engineer becomes suddenly insane and wrecks a train by running it at a high speed.[11]

[98] Amies v. Stevens, 1 Strange 131.

[99] Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Bonman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562.

[1] Elliott R. R. (2d ed.), § 1455; Smith v. Western Railway of Alabama, 91 Ala. 455, 8 So. 754, 11 L. R. A. 619, 24 Am. St. 929; Norris v. Savannah &c. R. Co., 23 Fla. 182, 1 So. 475, 11 Am. St. 355; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Nashville &c. R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594.

[2] Slater v. S. Car. R. Co., 29 S. Car. 96, 6 S. E. 936.

[3] Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Black v. Chicago, B. & Q. R. Co., 30 Nebr. 197, 46 N. W. 428; Feinberg v. Delaware &c. R. Co., 52 N. J. L. 451, 20 Atl. 33.

[4] Blythe v. Denver & R. G. R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. 403.

[5] New England & S. Steamship Co. v. Paige, 108 Ga. 296, 33 S. E. 969; Alabama G. S. R. Co. v. Quarles, 145 Ala. 436, 40 So. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. 54 (cyclone).

[6] Hutchinson Carriers (3d ed.), § 79; Forward v. Pittard, 1 T. R. 27; Miller v. Steam Nav. Co., 10 N. Y. 431, 13 Barb. (N. Y.) 361. Or unless purely accidental, and impossible to prevent. See, Stiles v. Louisville & U. R. Co., 129 Ky. 175, 110 S. W. 820, 130 Am. St. 429n; Lehman v. Morgan's La. & Tex. Steamship Co., 115 La. 1, 70 L. R. A. 562, 112 Am. St. 259, 5 Am. & Eng. Ann. Cas. 818.

[7] Caldwell v. New Jersey Steamboat Co., 56 Barb. (N. Y.) 425; The Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406; Bulkley v. Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 1 Sprague's Dec. (U. S.) 477, 16 L. ed. 599.

[8] Mershon v. Hobensack, 2 Zab. (N. J.) 372; Plaisted v. Boston & Kennebec Steam Navigation Co., 27 Maine 133.

[9] Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. 859.

[10] Caldwell v. New Jersey Steamboat Co., 56 Barb. (N. Y.) 425, affd. 47 N. Y. 282; Patton's Admrs. v. Magrath, 21 Dudley (S. Car.) 159, 31 Am. Dec. 552; New Jersey S. N. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; The Northern Belle, 9 Wall. (U. S.) 526, 19 L. ed. 746.

[11] Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. 170.

§ 168. Carrier's exposure to danger—Deviation from route. —If the carrier has negligently exposed himself to the danger, he cannot set up that the act of God caused the loss. Instances are where a carrier received horses for transportation, knowing that a line over which they would have to pass was obstructed by a flood,[12] where a wagoner tried to cross a stream immediately after a rain, and his wagon miring down in the center of the stream, the sudden rise damaged the goods,[13] where cars were left standing in a place liable to be submerged,[14] or where the carrier put to sea in an unseaworthy vessel.[15] Where the carrier deviates from the usual course and thus encounters danger, he is liable for loss caused by an act of God.[16] But a carrier of live stock who in case of necessity deviates from the direct course is not simply because of such deviation liable for injuries to the stock caused by a flood.[17] A carrier who chooses an unsafe route is usually liable, however, even for loss caused by an act of God.[18]

§ 169. Where accident would not have happened save for delay.—The general rule seems to be that the carrier is not liable where, except for delay on his part, the goods would not have been exposed to accident, unless he could have foreseen such accident as a probable consequence of his delay.[19] But many

[12] Adams Express Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666.

[13] Campbell v. Morse, 1 Harper (S. Car.) 468.

[14] Baltimore & O. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643; Grier v. St. Louis Merchants' Bridge Term. R. Co., 108 Mo. App. 565, 84 S. W. 158.

[15] Bell v. Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398. See Kish v. Taylor (1911), 1 K. B. 625, 80 L. J. K. B. (N. S.) 601, 103 L. T. (N. S.) 785, 27 T. L. R. 174, 16 Com. Cas. 59, 11 App. Mar. L. Cas. 544, 2 Brit. Rul. Cas. 575, 587 and note.

[16] Davis v. Garrett, 6 Bing. 716; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Powers v. Davenport, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; Louisville & C. Packet Co. v. Rogers, 20 Ind. App. 594, 49 N. E. 970; Chicago G. W. R. Co. v. Dunlop, 71 Kans. 67, 80 Pac. 34; Seavey v. Transit Co., 106 Wis. 394, 82 N. W. 285. See Joseph Thorley, Ltd., v. Orchis Steamship Co., Ltd., 76 L. J. K. B. (N. S.) 595, 96 L. T. (N. S.) 488, 23 T. L. R. 328, 12 Com. Cas. 251, 2 Brit. Rul. Cas. 565 and note.

[17] Empire State Cattle Co. v. Atchison &c. R. Co., 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. 607; Minnesota &c. Cattle Co. v. Atchison &c. R. Co., 210 U. S. 1, 15 Am. & Eng. Ann. Cas. 70, and see note, 15 Am. & Eng. Ann. Cas. 76 (citing many cases on carrier's liability for deviation).

[18] See cases cited in notes 57, 58 in this chapter, § 159.

[19] Rodgers v. Missouri Pac. R. Co., 75 Kans. 222, 10 L. R. A. (N. S.) 658, 121 Am. St. 416, 12 Am. & Eng. Ann. Cas. 441 (a very exhaustive case, strongly supporting this doctrine); Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am.

states follow an opposite rule, in analogy to the rule in regard to deviation, and hold the carrier liable, where, after he has delayed the shipment, the goods are damaged by an act of God, when, if the goods had been carried in a reasonable time, they would have escaped.[20] Interesting cases applying these rules are furnished by an unprecedented flood which occurred at Kansas City in May and June, 1903. In several jurisdictions actions were brought against carriers for damages occasioned by the flood injuring goods in cars, to which flood they were exposed by delay of the carrier. The courts of Minnesota,[21] Iowa,[22] and Nebraska[23] held the carriers liable on the ground that the goods would not have been destroyed except for the delay, for even though the flood was not anticipated, yet the delay extended the time during which such an unprecedented flood might occur. In a later case, the Supreme Court of Kansas declined to follow the reasoning of these courts, and absolved the carrier from liability, holding that although the delay was negligent, destruction by the flood could not have been foreseen as a probable consequence.[24] When the carrier has met with an accident which would be among the legal exceptions, still, if the goods are not entirely destroyed, he must use a reasonable degree of care to preserve and save

Dec. 645; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Memphis & Charleston R. Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909.

[20] Alabama &c. R. Co. v. Quarles, 145 Ala. 436, 8 Am. & Eng. Ann. Cas. 308, 40 So. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. 54; Wald v. Pittsburg, C. C. & St. L. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. 332; Green-Wheeler Shoe &c. Co. v. Chicago, R. I. R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Am. & Eng. Ann. Cas. 45; Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. 361, 3 Am. & Eng. Ann. Cas. 450; Wabash R. Co. v. Sharpe, 76 Nebr. 424, 107 N. W. 758, 124 Am. St. 823; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426. See also, Central of Ga. R. Co. v. Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D. 965 and note.

[21] Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. 361, 3 Am. & Eng. Ann. Cas. 450.

[22] Green-Wheeler Shoe Co. v. Chicago &c. R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Am. & Eng. Ann. Cas. 45.

[23] Wabash R. Co. v. Sharpe, 76 Nebr. 424, 107 N. W. 758, 124 Am. St. 823.

[24] Rodgers v. Missouri Pac. R. Co., 75 Kans. 222, 10 L. R. A. (N. S.) 658, 121 Am. St. 416, 12 Am. & Eng. Ann. Cas. 441. But in a later Kansas case, it was held that a carrier which wrongfully refuses to deliver goods upon demand made by the consignee promptly after notice is liable for their destruction the next day by an unprecedented flood. Henry v. Atchison &c. R. Co., 83 Kans. 104, 109 Pac. 1005, 28 L. R. A. (N. S.) 1088.

them, and if he does not, he is not excused by the character of the agency which caused the accident.[25] Nor will destruction by the act of God excuse the carrier after he has wrongfully refused to deliver to the consignee who presents the bill of lading.[26]

§ 170. **Burden of proof.**—The burden of proof is on the carrier to show that goods lost were destroyed by the act of God,[27] and in some jurisdictions he must also show his freedom from negligence contributing to the loss.[28]

§ 171. **What may be act of public enemy.**—If goods are captured by the forces of a country at war with the carrier's country, the carrier is not liable, it being held a hardship too great to make him pay losses when he has no recourse against those who occasioned them.[29] Loss caused by pirates comes within this exception,[30] but losses occasioned by thieves or robbers,[31] strikers, mobs, or rioters[32] are held not to be caused by acts of the public enemy, either on the ground that the carrier has recourse against the persons causing the loss, or that if the carrier is absolved from liability, he might collude with thieves to defraud

[25] Nugent v. Smith, L. R. 1 C. P. Div. 423; Baltimore & O. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643; Grier v. St. Louis Merchants' &c. R. Co., 108 Mo. App. 565, 84 S. W. 158; Chicago &c. R. Co. v. Logan, 23 Okla. 707, 105 Pac. 343, 29 L. R. A. (N. S.) 663; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695n; Nashville &c. R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; Memphis & Charleston R. Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909. Where a carrier tendered to a connecting carrier a car containing goods, and such carrier refused to receive it because of inability to handle it, and the carrier, being warned of danger from a flood, took the car to the safest place for detention, it was not liable for destruction of the goods by the flood, which amounted to an act of God. Armstrong v. Illinois Central R. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A. (N. S.) 671 and note.

[26] Richmond & D. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. 446.

[27] Elliott R. R. (2d ed.), § 1457 and cases cited; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783.

[28] Elliott R. R. (2d ed.), § 1457 and cases cited; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54 and note; McGraw v. Baltimore & O. R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

[29] Russell v. Niemann, 17 C. B. (N. S.) 163; Coggs v. Bernard, 2 Ld. Raym. 909; Gage v. Tirrell, 9 Allen (Mass.) 299; Seligman v. Arniyo, 1 N. Mex. 459; Hall v. Pennsylvania R. Co., 14 Phila. (Pa.) 414.

[30] Story Bailments (9th ed.), § 526; Pickering v. Barkley, Style, 132.

[31] Coggs v. Bernard, 2 Ld. Raym. 909; Morse v. Slew, 1 Ven. 190.

[32] Elliott R. R. (2d ed.), § 1459; Missouri Pac. R. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. 208; Pittsburg, C. C. & St. L. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. 316; Hall v. Pennsylvania R. Co., 14 Phila. (Pa.) 414.

the shipper.[33] If rebellion becomes revolution, and those in arms against the public authority acquire the rights of belligerents, then carriers of either belligerent may invoke the public enemy doctrine to release them from liability for goods captured by forces of the other.[34] This rule was applied in the American Revolution and in the Civil War.[35] It is not necessary that war should have been actually declared, if hostilities have actually been begun, in order to create the relation of public enemies.[36] The carrier who by negligence or deviation exposes goods to the public enemy is liable.[37] If hostilities commence between the carrier's country and that to which he has contracted to carry the goods, he is excused from the performance of his contract,[38] but must use reasonable efforts to preserve the goods for the owner,[39] and, if the restraint be only temporary, must complete the contract after its removal. If the goods are contraband of war, consigned to a country at war, the carrier is justified in refusing to carry them, and even may unload them in order to carry safely other goods which he has taken on board.[40]

§ 172. What is meant by loss caused by public authority. —If goods are taken and seized under the police powers of the state, as intoxicating liquors, the sale of which is forbidden by law, the carrier is not liable;[41] likewise if they are taken from

[33] Coggs v. Bernard, 2 Ld. Raym. 909.

[34] Hutchinson Carriers (3d ed.), § 317; Elliott R. R. (2d ed.), § 1458.

[35] Bland v. Adams Exp. Co., 1 Duv. (Ky.) 232; Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256; Prize Cases, 2 Black (U. S.) 635; Thorington v. Smith, 8 Wall. (U. S.) 1; contra, Dole v. Merchants' Mut. &c. Ins. Co., 51 Maine 465.

[36] Prize Cases, 2 Black (U. S.) 635; Alexander's Cotton, 2 Wall. (U. S.) 404.

[37] Parker v. James, 4 Camp. 112; Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256; Holladay v. Kennard, 12 Wall. (U. S.) 254, 20 L. ed. 390; United States Exp. Co. v. Kountz, 8 Wall. (U. S.)) 342, 19 L. ed. 457.

[38] Griswold v. Waddington, 16 Johns. (N. Y.) 438; Prize Cases, 2 Black (U. S.) 635; Montgomery v. United States, 15 Wall. (U. S.) 395; Mitchell v. United States, 21 Wall. (U. S.) 350.

[39] Hadley v. Clarke, 8 T. R. 259; Bork v. Norton, 2 McLean (U. S.) 422, Fed. Cas. No. 1659.

[40] Nobel's Explosives Co. v. Jenkins, 2 Q. B. (1896) 326, 65 L. J. Q. B. 638; The Styria, 101 Fed. 728, 41 C. C. A. 639.

[41] Southern Exp. Co. v. Sotille, 134 Ga. 40, 67 S. E. 414, 28 L. R. A. (N. S.) 139; Bliven v. Hudson R. R. Co., 35 Barb. (N. Y.) 188, 36 N. Y. 403; Baltimore &c. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117 and notes, 34 Am. St. 579; American Exp. Co. v. Mullins, 212 U. S. 311, 53 L. ed. 525, 15 Am. & Eng. Ann. Cas. 536; Wells v. Maine Steamship Co., 4 Cliff. (U. S.) 228.

him by legal process against the owner.[42] In both cases, however, if they are taken without proper legal process, or upon process not fair upon its face, the carrier may still be liable.[43]

§ 173. Loss caused by act of shipper.—If expressly or by his conduct, the shipper conceals or misrepresents the nature of the goods, so that the carrier does not give to them the care which he would if he had known their value, the carrier may be relieved from liability.[44] This may arise merely from an omission to tell the nature of the goods,[45] or from improper marking;[46] or if the goods are unskilfully loaded or packed by the shipper, the carrier is not liable for losses thus occasioned.[47] Where the custody of the goods is mixed, both the shipper and the carrier having control, the carrier is not liable for damage caused by the shipper's failure on his part of the care of the shipment.[48]

§ 174. Loss caused by inherent nature of the goods.—Among losses caused by the inherent nature of the goods, for which the carrier, if not himself at fault, is not liable, may be mentioned the natural decay of fruits, evaporation of liquids, the

[42] See post, § 244.

[43] See post, § 244.

[44] Hutchinson Carriers (3d ed.), §§ 328-333; Elliott R. R. (2d ed.), § 1491; Gibbon v. Paynton, 4 Burr. 2298; Chesapeake &c. R. Co. v. Hall, 136 Ky. 379, 124 S. W. 372, Ann. Cas. 1912A, 364; Nathan v. Woolverton, 134 N. Y. S. 469; Bottum v. Charleston &c. R. Co., 72 S. Car. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773n, 110 Am. St. 610, 5 Am. & Eng. Ann. Cas. 118; Schacht v. Illinois Cent. R. Co., 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176.

[45] Elliott R. R. (2d ed.), § 1491; Hayes v. Wells, 23 Cal. 185, 83 Am. Dec. 89; Chicago &c. R. Co. v. Thompson, 19 Ill. 577; American Exp. Co. v. Perkins, 42 Ill. 458; Chesapeake &c. R. Co. v. Hall, 136 Ky. 379, 124 S. W. 372; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85 (money in trunk); Houston & T. C. R. Co. v. Burke, 55 Tex. 323.

[46] Lake Shore &c. R. Co. v. Hodapp, 83 Pa. St. 22; Bottum v. Charleston &c. R. Co., 72 S. Car. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773n, 110 Am. St. 610; Congar v. Chicago & N. W. R. Co., 24 Wis. 157, 1 Am. Rep. 164.

[47] Elliott R. R. (2d ed.), § 1492; Goodman v. Oregon R. &c. Co., 22 Ore. 14, 28 Pac. 894, 49 Am. & Eng. R. Cas. 87; Klauber v. American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

[48] However, where the carrier contracted to carry and deliver two carloads of potatoes in extreme cold weather, and the shipper was to provide a caretaker to build fires to keep them from freezing, and the carrier separated the cars, carrying one ahead on the train, leaving the other at the siding, so that the caretaker could not attend to both, and the potatoes in the car left behind froze and became worthless, the carrier was liable, even though the potatoes did not freeze until after delivery to a connecting carrier. Whitnack v. Chicago, B. & Q. R. Co., 82 Nebr. 464, 118 N. W. 67, 130 Am. St. 692, 19 L. R. A. (N. S.) 1011n.

bursting of vessels because of fermentation of their contents, the natural death of animals, and damage to animals caused by their viciousness or natural propensities. The latter may include the destruction of animals by each other, or their death from fright, or starvation, from heat or cold, or because, through viciousness or fright, they put themselves into a situation where they die or are injured, if the carrier has furnished sufficient accommodations.[49] The rule applies to carriers by water as well as land carriers.[50] The reason for this, as for all the other exceptions, is obvious; the carrier could not prevent such loss by any means in his power. Where the carrier could have prevented loss, he is usually liable, either on the ground of his own negligence, the ground that he exposed the goods to danger, or the ground that he did not furnish suitable accommodations. The rule as to injuries caused by the propensities of animals will be considered more fully under the chapter on Carriers of Live Stock.[51]

§ 175. Statutory exceptions to carrier's liability.—Exceptions to a common carrier's liability made by statute have the effect of the legal exceptions of the common law, and in this country the most conspicuous example of these is the federal statute known as the Harter act, to the effect that if the owner of a vessel transporting merchandise to or from any port shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, the vessel, her owner, agent, and charterers shall not be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel.[52]

§ 176. Liability for delay.—The law makes it a part of the carrier's contract to carry safely, and as to this part of the contract makes him an insurer of its performance. It also makes

[49] Hutchinson Carriers (3d ed.), § 334; Elliott R. R. (2d ed.), §§ 1474, 1475, 1545-1557; Greenshields v. Stevens (1908), A. C. 431, 13 Am. & Eng. Ann. Cas. 245; Ohio & M. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291. See also, Cleveland, C. C. & St. L. R. Co. v. Rudy, 173 Ind. 181, 89 N. E. 951.

[50] Greenshields v. Stevens (1908), A. C. 431, 13 Am. & Eng. Ann. Cas. 245, and cases cited in note.

[51] See post, § 260.

[52] U. S. Revised Statutes, 1901, §§ 4281-4289. For a comparatively full discussion of the Harter Act, see Hutchinson Carriers (2d ed.), § 345 et seq.

it a part of the implied contract entered into by every carrier that the goods shall be delivered within a reasonable time, but as to this there is no extraordinary liability, only that of an ordinary bailee, and the carrier is bound only to use reasonable care to deliver within a reasonable time, and is liable only for negligence in failing to do so.[53] If because of unreasonable delay the goods have deteriorated, the market-price has fallen, or the market has failed entirely, the carrier is liable in damages, but such delay is not a conversion of the goods unless a demand has been made and the carrier has failed to surrender them,[54] and the consignee cannot refuse to receive them merely because of unreasonable delay.[55] What is a reasonable time is usually a question of fact, dependent entirely on the circumstances.[56]

§ 177. **Special circumstances may increase duty not to delay.**—If a carrier has knowledge of special circumstances, as where goods are ordered for a special purpose, or present use in a given way, so that delay will defeat the purpose of the shipment, or cause special damages, he may be held to have contracted with such in view;[57] for instance, where the shipment was a piston rod necessary for the operation of a cotton gin,[58] or theatrical

[53] Taylor v. Great Northern R. Co., L. R. 1 C. P. 385; Cincinnati R. Co. v. Case, 122 Ind. 310, 23 N. E. 797; Philadelphia &c. R. Co. v. Lehman, 56 Md. 209; Gates v. Chicago B. & Q. R. Co., 42 Nebr. 379, 60 N. W. 583, 61 Am. & Eng. R. Cas. 218; Denman v. Chicago B. & Q. R. Co., 52 Nebr. 140, 71 N. W. 967; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117n, 34 Am. St. 579; Ruppel v. Allegheny Valley R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. 666.

[54] Story Bailments (9th ed.), § 509; Davis v. Garrett, 6 Bing. 716; Ellis v. Turner, 8 T. R. 531; Southern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. 227; Hackett v. Boston C. & M. R. Co., 35 N. H. 390; Scovill v. Griffith, 12 N. Y. 509; Goldbowitz v. Metropolitan Exp. Co., 91 N. Y. S. 318.

[55] Chicago &c. R. Co. v. Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A. (N. S.) 1107; Chesapeake &c. R. Co. v. Saulsbury, 126 Ky. 179, 103 S. W. 254, 12 L. R. A. (N. S.) 431 and note.

[56] Elliott R. R. (2d ed.), § 1483; Hutchinson Carriers (3d ed.), § 652; St. Louis &c. R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21; Michigan &c. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278. A carrier of perishable freight like potatoes, in hot weather, is bound to deliver immediately to a succeeding carrier, and is liable for rotting of the potatoes caused by failure so to deliver. St. Louis &c. R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21.

[57] Ft. Smith & W. R. Co. v. Williams (Okla.), 121 Pac. 275; Mills v. Southern R. Co. (S. Car.), 73 S. E. 772. See cases cited in following notes.

[58] American Express Co. v. Jennings, 86 Miss. 329, 38 So. 374, 109

scenery to be used for a particular exhibition,[59] or where after cattle feed was transported to the destination, the carrier was informed that the owner was out of feed, and must have prompt delivery, the carrier was liable in special damages for negligent delay.[60] The notice necessary to charge the carrier with special damages may be constructive, and a carrier may take notice from the fact that a furniture manufacturing company causes an engine shaft to be shipped to itself that it is needed at once,[61] or where a threshing machine is consigned in June to an implement dealer in Kansas, the carrier is supposed to know that it was intended for immediate use, and is specially liable for delay in transporting until the close of the threshing season.[62] Damages from mere negligent delay are generally treated as arising ex contractu, and may not be increased by bringing an action ex delicto.[63]

§ 178. **Excuses for delay.**—An accident or misfortune, though not inevitable or of such class as to be called an act of God, may excuse delay. Among these are a heavy snow,[64] the washout of a bridge,[65] low water in a navigable river,[66] the freezing of a canal or river,[67] a collision caused by the negligence of another carrier,[68] the negligence of another railroad over which the carrier transports goods,[69] an unusual and unanticipated press of freight,[70] an unusual fire which destroyed part of the railroad

Am. St. 708; Traywick v. Southern R. Co., 71 S. Car. 82, 50 S. E. 549, 110 Am. St. 563.

[59] Weston v. Boston & M. R. Co., 190 Mass. 298, 112 Am. St. 330, 76 N. E. 1050, 4 L. R. A. (N. S.) 569n.

[60] Bourland v. Choctaw O. & G. R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. 646.

[61] Harper Furniture Co. v. Southern Exp. Co., 148 N. Car. 87, 62 S. E. 145, 30 L. R. A. (N. S.) 483n, 128 Am. St. 588.

[62] Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co., 73 Kans. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. 468.

[63] American Exp. Co. v. Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. 708.

[64] Palmer v. Atchison T. & S. F. R. Co., 101 Cal. 187, 35 Pac. 630; Ballentine v. North Missouri R. Co., 48 Mo. 491, 93 Am. Dec. 315.

[65] Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458; Burnham v. Alabama & V. R. Co., 81 Miss. 46, 32 So. 912.

[66] Bennett v. Byram, 38 Miss. 17; Silver v. Hale, 2 Mo. App. 557.

[67] Philadelphia & Reading R. Co. v. Peale, 135 Fed. 606; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; Beckwith v. Frisbie, 32 Vt. 559.

[68] Conger v. Hudson R. R. Co., 6 Duer. (N. Y.) 375.

[69] Taylor v. Great Northern R. Co., L. R. 1 C. P. 385; Livingston v. New York Cent. &c. R. Co., 5 Hun (N. Y.) 562.

[70] Wibert v. New York & E. R. Co., 12 N. Y. 245; Mauldin v. Seaboard Air Line R. Co., 73 S. Car. 9, 52 S. E. 677. Not if the carrier's equip-

track,[71] and an embargo upon a port.[72] The misconduct of the carrier's servants is no excuse for delay,[73] but if former servants of the carrier have struck, and they hinder its present servants from performing the contract of carriage, the carrier is not liable for delay,[74] nor is it ordinarily liable for delay caused by the acts of rioters.[75]

§ 179. **Duty to delay under some circumstances.**—Under certain circumstances delay may be a duty, for the carrier is not justified in exposing the goods to known danger in order to carry them more quickly, his duty to carry them safely being higher than that to carry within a reasonable time.[76] If, however, there are circumstances existing which will excuse delay, this does not necessarily terminate the contract of carriage, and the carrier is under an obligation to carry as soon as the circumstances are removed, and may be liable for unreasonable delay after this time.[77]

ment is inadequate to handle ordinarily to be expected business. Yazoo &c. R. Co. v. Blum, 88 Miss. 180, 40 So. 748, 10 L. R. A. (N. S.) 432n.

[71] Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

[72] See cases cited under last note 39, this chapter.

[73] Blackstock v. New York & E. R. Co., 20 N. Y. 48, 75 Am. Dec. 372; Weed v. Panama R. Co., 17 N. Y. 362.

[74] Central R. & Banking Co. v. Georgia Fruit &c. Exchange, 91 Ga. 389, 17 S. E. 904; Bartlett v. Pittsburg R. Co., 94 Ind. 281; Louisville & N. R. R. Co. v. Bell, 3 Ky. L. 393; Geismer v. Lake Shore & M. S. R. Co., 102 N. Y. 563, 17 N. E. 828, 55 Am. Rep. 837; International & G. N. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545.

[75] Bartlett v. Pittsburg R. Co., 94 Ind. 281; Gulf C. & S. F. R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. 45.

[76] Davis v. Garrett, 6 Bing. 716; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; International & G. N. R. Co. v. Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

[77] Hadley v. Clarke, 8 T. R. 259; Lowe v. Moss, 12 Ill. 477; Vicksburg & M. R Co. v. Ragsdale, 46 Miss. 458; Burnham v. Alabama & V. R. Co., 81 Miss. 46, 32 So. 912; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 56; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117n, 34 Am. St. 579.

CHAPTER XII.

LIMITATION OF LIABILITY BY CONTRACT.

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§ 180. In general.—The contract between the carrier and the shipper, in so far as it has been heretofore discussed, is mainly an implied one, forced on the carrier by law, and the carrier's liability as set out previously is made a part of every contract of carriage of goods, unless the parties limit that liability by special contract. In fact, almost all goods shipped to-day are carried upon contracts which in some manner limit the liability of the carrier, and lessen the strictness of the common-law rule. It was formerly held that contracts lessening the liability of the common carrier were against public policy, but with the introduction of better and safer methods of transportation, and the large increase in the amount of transportation, and with the reflection that the shipper entering into a contract limiting this liability

may take advantage by obtaining lower rates than if the carrier were held to the common-law liability, the most of the courts of this country now recognize the right of a common carrier to limit liability by contract to some extent. Sometimes the carrier contracts to increase his liability, as for instance where goods to reach their destination must be carried over several lines, and the carrier binds himself to transport the goods all the way, and to be responsible for their safety until they reach their final destination. Usually the provisions of the contract limiting liability are contained in the same instrument, which serves also as a receipt for the goods and evidence of their acceptance, namely, the bill of lading, although limitation contracts may be made in other ways, as by notice, by printed tickets, or checks, or by parol. In all cases the essentials of a contract, mutual assent and a sufficient consideration, must be present.

§ 181. **Limitation of liability by notice.**—In early English cases it was held that the carrier might limit liability not only by express contract, but also by notice to the shipper, even by a general public notice, if brought to the shipper's knowledge. So much confusion arose over the application of this rule that the Land Carriers Act was enacted in 1830, and the Railway and Canal Traffic Act in 1854, under the provisions of which the carrier is allowed to limit liability by special contract, or as to certain articles by special notice even against its own negligence.[1] In the earliest American cases it was held, in direct opposition to the English cases, that by the common law the carriers did not have the right to limit liability by public notice, and for reasons of public policy they should not have such right,[2] and a little later the New York Supreme Court decided that the carrier could not limit his liability by express contract.[3] Shortly afterward the United States Supreme Court decided that a common carrier may, at least by special contract, restrict his liability,[4] and the New York

[1] Elliott R. R. (2d ed.), § 1495; Hutchinson Carriers (3d ed.), §§ 390-399.

[2] Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470.

[3] Gould v. Hill, 2 Hill (N. Y.) 623.

[4] New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

Supreme Court then followed this ruling.[5] Now in almost every state the carrier may, if no statute prohibits, make an express or special contract with its employer, by which the latter releases a portion of the carrier's common-law liability as insurer of the goods.[6]

§ 182. **Essentials of the contract.**—To be effective, the contract must be special and express, in clear terms, and exemption from liability cannot be a matter of inference from general or ambiguous terms.[7] There must have been a mutual assent to its terms, and it is generally held that the carrier must show, or it must appear, that it stood willing to carry the goods upon the terms of common-law liability, and that the shipper had a choice between shipping on these terms, or under the terms of the special contract.[8] It has been held that it need not show that an offer was made to carry the goods as insurer, but that it would have carried as such if the shipper had demanded.[9] If it would have been useless to have demanded that the goods be so carried, then the shipper would be under no duty so to demand, and though he shipped goods under a contract of limited liability, he is held not to have consented thereto.[10]

[5] Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125 and note.

[6] See cases cited in Elliott R. R. (2d ed.), § 1500; Hutchinson Carriers (3d ed.), § 401, and see notes reviewing the authorities in 32 Am. Dec. 497, 82 Am. Dec. 379, 5 Am. St. 725, 3 L. R. A. 343, 13 L. R. A. 518, 3 Am. & Eng. R. Cas. 272, 7 Lewis Am. Rep. & Corp. 282, 11 Lewis Am. Rep. & Corp. 647, 88 Am. St. 77 et seq.

[7] Saunders v. Southern R. Co., 128 Fed. 15, 62 C. C. A. 523; Westcott v. Fargo, 61 N. Y. 542; Nicholas v. Railroad Co., 89 N. Y. 370.

[8] Little Rock &c. R. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. 230; Cleveland C. C. & St. L. R. Co. v. Hollowell, 172 Ind. 466, 88 N. E. 680; Louisville &c. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; Deming v. Merchants' Cotton-Press Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955. But the United States Supreme Court has held that if the stipulation is just and reasonable, there is no necessity for alternative choice, or independent consideration. Arthur v. Texas & Pac. R. Co., 204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. 338, revg. 139 Fed. 127, 71 C. C. A. 391. And see Cau v. Texas & P. R. Co., 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. 663.

[9] St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. 75; Louisville &c. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031; Deming v. Merchants' Cotton-Press Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518. See also, Cleveland C. C. & St. L. R. Co. v. Hollowell, 172 Ind. 466, 470, 88 N. E. 680.

[10] Little Rock & Ft. S. R. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803,

For the law imposes upon the carrier the duty to carry all goods of the kind which he holds himself out as carrying as an insurer of their safety, and the owner of goods has a right to demand that his goods shall be carried under the insurer's liability. In Kansas,[11] Iowa[12] and Texas[13] contracts limiting the common carrier's liability are prohibited by statute, in Nebraska[14] and Kentucky[15] by the state constitutions.

§ 183. **What is a special contract.**—The contract must be express and mere notice will not create an express contract.[16] The knowledge of the contents of a public notice was held in early English cases to constitute a contract, since with knowledge of the terms of a carrier, if one does business with him, he is held to have contracted with reference to such terms. This has been said to be merely evidence of an implied contract.[17] If there is express assent to a notice there may be an express contract, and when a shipper takes a bill of lading containing the notice from the carrier he is held to have assented to its terms, thus making a special or express contract.[18] Under the English Land Carriers Act, when the carrier hands to the employer a printed notice of terms, or ticket which he receives, he is held bound by its terms as an express contract.[19] Since in America it is the custom to give to the shipper a receipt or bill of lading containing the terms of the

38 Am. St. 230, 18 L. R. A. 527; Cleveland C. C. & St. L. R. Co. v. Hollowell, 172 Ind. 466, 88 N. E. 680.

[11] St. Louis & S. F. R. Co. v. Sherlock, 59 Kans. 23, 51 Pac. 899 (except with permission of board of railroad commissioners).

[12] Iowa Code (1897), § 2074; Lucas v. Burlington C. R. & N. R. Co., 112 Iowa 594, 84 N. W. 673.

[13] Galveston H. & S. A. R. Co. v. Ball, 80 Tex. 602, 16 S. W. 441. This statute does not apply to interstate shipments. Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

[14] Missouri Pac. R. Co. v. Vandeventer, 26 Nebr. 222, 41 N. W. 998, 3 L. R. A. 129; 37 Am. & Eng. R. Cas. 651; Wabash R. Co. v. Sharpe, 76 Nebr. 424, 107 N. W. 758, 124 Am. St. 823.

[15] Southern Exp. Co. v. Fox, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. 241; Cincinnati N. O. & T. P. R. R. Co. v. Steele, 140 Ky. 383, 131 S. W. 22, 140 Am. St. 388.

[16] Georgia R. Co. v. Gann, 68 Ga. 350; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898; Williams v. Central R. Co., 93 App. Div. (N. Y.) 582, 88 N. Y. S. 434; Brown v. Adams Exp. Co., 15 W. Va. 812.

[17] Crouch v. London & N. W. R. Co., 2 C. & R. 789.

[18] Bernstein v. Weir, 40 Misc. (N. Y.) 635, 83 N. Y. S. 48.

[19] Palmer v. The Grand Junction R. Co., 4 M. & W. 748; Austin v. The Manchester &c. R. Co., 10 C. B. 454.

carrier as to his liability, when goods are delivered to land carriers, it is held that the shipper's taking of such a receipt signifies his assent to the contract therein expressed, whether or not it has been read to him or explained, or his attention called thereto, or he understood it, or was aware of its conditions, or expressly assented to them, if no fraud is practiced by the carrier, and opportunity is given the shipper to know the contents.[20] So when under such circumstances the shipper accepts a bill of lading, the presumption that he assents to it is held to be conclusive.[21] It is said that every man of reasonable intelligence nowadays knows that no carrier now undertakes to carry under the common-law liability. In Illinois and Georgia, however, it is held that the mere acceptance by the owner of a receipt does not constitute an assent to a limitation of the carrier's liability by terms therein contained, but the carrier must show by outside evidence that there was an actual acceptance on the part of the shipper.[22]

§ 184. **Contract may be in parol.**—A parol contract limiting liability may be shown, and if established will be held as valid as a written one, the only difference being in the kind of evidence and the ease of proof.[23] As said in a previous section, all prior

[20] Louisville &c. R. Co. v. Meyer, 78 Ala. 597; St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. 75; Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116; Patrick v. Missouri R. Co., 5 Ind. Ter. 742, 88 S. W. 330, modified 144 Fed. 632, 75 C. C. A. 434; Stewart v. Cleveland C. C. & St. L. R. Co., 21 Ind. App. 218, 52 N. E. 89; Mulligan v. Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514; Kallnan v. United States Exp. Co., 3 Kans. 205; Cox v. Vermont Cent. R. Co., 170 Mass. 129, 49 N. E. 97; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Patterson v. Kansas City &c. R. Co., 56 Mo. App. 657; Merrill v. American Exp. Co., 62 N. H. 514; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Farnham v. Camden R. Co., 55 Pa. St. 53; Swindler v. Hilliard, 2 Rich. L. (S. Car.) 286, 45 Am. Dec. 732; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Cau v. Texas & P. R. Co., 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. 663; Davis v. Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. 852; Boorman v. American Exp. Co., 21 Wis. 154. Shipper cannot set up hurried execution, lack of due care in execution or ignorance of provisions. Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955.

[21] Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Cau v. Texas & P. R. Co., 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. 663.

[22] Southern Express Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. 227; Adams Express Co. v. Haynes, 42 Ill. 89; Chicago &c. R. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68.

[23] Missouri &c. R. Co. v. Patrick, 144 Fed. 632, 75 C. C. A. 434; Louis-

oral agreements are considered to have been merged in the written bill of lading if such is accepted,[24] but it may be shown that the written contract has been modified by a subsequent parol contract.[25] The contract need not be signed by both parties; if the carrier signs, it is conclusive evidence of his assent to the terms, and if the shipper accepts, his assent is as conclusive as if he had signed.[26] But in certain states the statute requires such contracts to be in writing and signed by both parties, and these statutes are binding.[27]

§ 185. **Notices informing of carrier's regulations.**—Though the carrier may not limit his strict liability as an insurer by public notice, nor private notice unless assent of the shipper is shown, yet he may by notice inform the public that he carries only a certain class of goods, or only over his own route, or that he will carry articles only under a certain value, unless the shipper complies with certain conditions, and if he can show that the employer has knowledge of this notice, then he is not liable beyond its terms.[28] The reason for this rule would seem to be that he has not held himself out to be a carrier beyond the extent limited by public notice, and this notice has the same effect as the knowledge of the reasonable rules and regulations of the carrier upon the one who does business with him.

§ 186. **To be effectual the terms of limitation must be a part of the contract.**—The mere acceptance of the carrier's receipt will not bind the shipper to the limitations of liability contained therein unless the terms of limitation are written or printed upon it as a part of the contract entered into, and in such a manner that they cannot reasonably be overlooked.[29] So it has

ville &c. R. Co. v. Nicolai, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. 206; American Transp. Co. v. Moore, 5 Mich. 368; Gould v. Hill, 2 Hill (N. Y.) 623.

[24] See cases cited under § 146.

[25] See cases cited under § 146.

[26] See cases cited under note 20.

[27] Feige v. Mich. Cent. R. Co., 62 Mich. 1, 28 N. W. 685.

[28] 2 Greenleaf Ev., § 215; Moses v. Boston & M. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Orange County Bank v. Brown, 9 Wend. (N. Y.) 115; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 22 Vt. 186, 56 Am. Dec. 68.

[29] Hutchinson Carriers (3d ed.), § 415; Elliott R. R. (2d ed.), §§ 1502, 1502a. It is held that where a shipper fills out a printed blank furnished by a carrier, he makes it his own contract and is bound by clauses limiting liability contained therein. Per-

been held that if there are terms of limitation upon the back of the receipt there is no presumption that the party accepting the receipt knew of them,[30] and even that such a presumption does not arise when such terms printed upon the back are referred to upon the face.[31] So where a limiting clause was stamped upon the receipt in red ink, in one corner at right angles to the text,[32] or where a revenue stamp was fixed over a limitation clause in printing,[33] it was held that there was no presumption that the shipper assented to such terms. And if conditions tending to limit liability are written or printed upon the receipt, but not as a part of the contract, they are considered only notices, not binding upon the shipper unless assent is shown.[34] It has been held that where an express company delivered to a passenger in a railroad car, when the light was so dim that he could not read it, a baggage check which contained limitations upon liability printed in fine type, the carrier could not set up such limitations as a defense, since the carrier and the passenger were not upon terms of equality in the transaction, and the latter could not assent to what he did not know.[35] It has been held, however, that if a receipt is given to a person similarly situated, but under conditions such that he can easily read it, and he neglects to do so, he is bound, nevertheless, by its contents.[36]

§ 187. **Receipt must be delivered when goods accepted.**—To make the conditions of the receipt effectual in limiting liability it must usually be delivered to the shipper when the goods are accepted, for by accepting the goods without delivering such receipt the carrier has accepted them under the common-law

rin v. United States Exp. Co., 78 N. J. L. 515, 74 Atl. 462, 28 L. R. A. (N. S.) 645 and note.

[30] Baltimore & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245; Merchants' Despatch Transp. Co. v. Furthmann, 149 Ill. 66, 47 Ill. App. 561, 36 N. E. 624, 41 Am. St. 265; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297.

[31] Michigan Central R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Ayres v. Western R. Corp., 14 Blatch. (U. S.) 9, Fed. Cas. No. 689.

[32] New York N. H. & H. R. Co. v. Sayles, 87 Fed. 444, 32 C. C. A. 485.

[33] Perry v. Thompson, 98 Mass. 249.

[34] Hutchinson Carriers (3d ed.), § 415; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. 170.

[35] Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Madan v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153.

[36] Madan v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153; cases cited in note 20.

liability.[37] It might be shown in such instance, however, that the shipper ratified the receipt on receiving it, or that the usual course of business between the parties was such that the carrier was accustomed to receive goods, and issue a receipt later.[38] If there is no such custom of dealing and the carrier unintentionally failed to give a receipt, and there was no consent by the shipper to receive a receipt in future, the carrier is bound under the common law.[39] Where goods are accepted and the carrying begun under an oral agreement, it has been held that this oral agreement is not merged in a bill of lading afterward delivered to the shipper.[40]

§ 188. Character of limitations.—If the contract is fair and reasonable and based upon a sufficient consideration, it seems that the common carrier of goods may by express contract relieve himself from liability of any character, except from the consequences of fraud or felony by his servants or the negligence of himself and his servants.[41] Among examples of the manner in which the carrier may relieve himself by express contract from liability as an insurer are the following: The carrier of live stock may be exempted from liability for injuries to the stock not connected with the running and management of the train, but rather connected with the care of the stock, such as injury in loading and unloading, from placing too many in one compartment, from suffocation, overheating, weakness, escape and similar causes.[42] A carrier may be exempted from liability for loss by

[37] Louisville &c. R. Co. v. Meyer, 78 Ala. 597; Merchants' Despatch Transp. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Michigan Cent. R. Co. v. Boyd, 91 Ill. 268; St. Louis & S. F. R. Co. v. Clark, 48 Kans. 321, 29 Pac. 312; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Gaines v. Union & Ins. Transp. Co., 28 Ohio St. 418.

[38] Rubens v. Ludgate Hill Steamship Co., 65 Hun (N. Y.) 625, 48 N. Y. St. 732, 20 N. Y. S. 481, affd. 143 N. Y. 629, 37 N. E. 825; Shelton v. Merchants' Dispatch Transp. Co., 59 N. Y. 258.

[39] Gott v. Dinsmore, 111 Mass. 45.

[40] See cases cited in note under § 146. Merchants' Despatch Transp. Co. v. Furthmann, 149 Ill. 66, 47 Ill. App. 561, 36 N. E. 624, 41 Am. St. 265; Missouri Pac. R. Co. v. Beeson, 30 Kans. 298, 2 Pac. 496; St. Louis & S. F. R. Co. v. Clark, 48 Kans. 321, 29 Pac. 312; Guillaume v. General Transatlantic Co., 100 N. Y. 491, 3 N. E. 489.

[41] St. Louis, I. M. & S. R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21; St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. 75; Nashville &c. R. Co. v. Stone & Haslett, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955. See post, § 194.

[42] East Tennessee R. Co. v. John-

fire,[43] by strikers, mobs or rioters,[44] by thieves or robbers,[45] for the loss of goods of a dangerous character,[46] and may by contract provide that his liability in case the goods are delayed before delivery to another carrier shall be only that of a warehouseman.[47]

§ 189. Limitation of amount of liability.—It is the general rule that the shipper and carrier may enter into a contract upon a sufficient consideration, usually a reduced freight rate, placing a fair and good faith value upon the goods carried, as a basis of the carrier's charges and responsibility, beyond which value the carrier shall not be liable.[48] But a mere arbitrary and unreasonable valuation of the goods, inserted in the contract by the carrier, without notice to the shipper, and without consideration, does not bind the shipper.[49] Some authorities seem to hold

ston, 75 Ala. 596, 51 Am. Rep. 489; St. Louis I. M. & S. R. Co. v. Lesser, 46 Ark. 236; Georgia R. Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75; Baltimore &c. R. Co. v. Fox, 113 Ill. App. 180; Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. 239; Morse v. Canadian Pac. R. Co., 97 Maine 77, 53 Atl. 874; Myers v. Wabash &c. R. Co., 90 Mo. 98, 2 S. W. 263; Chicago, St. P. &c. R. Co. v. Schuldt, 66 Nebr. 43, 92 N. W. 162; Pennsylvania R. Co. v. Raiordan, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670; Belts v. Farmers' Loan & Trust Co., 21 Wis. 80.

[43] Reid v. Evansville &c. R. Co., 10 Ind. App. 385, 35 N. E. 703, 53 Am. St. 391; Johnson v. W. Jersey &c. R. Co., 78 N. J. L. 529, 74 Atl. 496, 138 Am. St. 625, 20 Am. & Eng. Ann. Cas. 228 and cases cited in note; Constable v. National Steamship Co., 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. 1062.

[44] Gulf C. & S. F. R. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

[45] The Saratoga, 20 Fed. 869.

[46] California Powder Works v. Atlantic & P. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648.

[47] Courteen v. Kanawha Dispatch, 110 Wis. 610, 86 N. W. 176, 55 L. R. A. 182.

[48] Elliott R. R. (2d ed.), § 1510; Pierce v. Southern Pac. R. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; Russell v. Pittsburg &c. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214; Graves v. Lake Shore &c. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Hill v. Boston H. T. & W. R. Co., 144 Mass. 284, 10 N. E. 836; note 88 Am. St. 105 et seq. See cases cited in notes immediately following. Donlon v. Southern Pac. R. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Am. & Eng. Ann. Cas. 1118, and note reviewing the authorities; Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116; Cole v. Minneapolis &c. R. Co., 117 Minn. 33, 134 N. W. 296; Greenwald v. Barrett, 199 N. Y. 170, 92 N. E. 218, 35 L. R. A. (N. S.) 971.

[49] Elliott R. R. (2d ed.), § 1510; Southern Exp. Co. v. Gibbs, 155 Ala. 303, 46 So. 465, 18 L. R. A. (N. S.) 874n, 130 Am. St. 24; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. 170; Chicago & N. W. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. 587 and note; Rosenfeld v. Peoria &c. R. Co., 103 Ind. 121; Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78, 138 Am. St. 768; Adams Exp. Co. v. Byers (Ind.), 95

that the shipper must fix the value to make the contract good, but it is often held that if a receipt is voluntarily accepted fixing a value upon the goods, the owner is presumed to have assented if no unfair advantage has been taken, although the value has been placed by the carrier.[50] The rules as to other limitations by receipt, and the conditions under which they are not binding, apply of course to this limitation. The authorities differ more as to whether such a stipulation is valid where the carrier is negligent. It is said in Elliott on Railroads,[51] "We believe that most of the apparently conflicting decisions can be reconciled in accordance with the following rules: 1. A bona fide contract, fairly made, in advance, upon sufficient consideration, fixing the value of the property or the rule for ascertaining its value in case of loss or injury, even if the carrier is guilty of negligence, is valid and enforcible, and, if based upon a lower rate of freight in proportion to the decreased liability, 'will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation.'[52] 2. A stipulation arbitrarily limiting the amount of recovery in case of the negligence of the carrier, without re-

N. E. 513. A live stock contract fixing a value at one-third of the real value is unreasonable and void. Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955. Limitation of liability to a nominal amount, in this case $50, where goods are of much greater value, makes the contract void. Southern Exp. Co. v. Rothenberg Co., 87 Miss. 656, 40 So. 65, 112 Am. St. 466.

[50] Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116 (case of live stock transportation); John Hood Co. v. American Pneumatic Service Co., 191 Mass. 27, 77 N. E. 638; Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. 151. Assent is presumed from the shipper's signature if there was no fraud, misrepresentation nor concealment. Baker v. Atlantic Coast Line R. Co., 82 S. Car. 146, 63 S. E. 611, 129 Am. St. 873; American Silk Dyeing &c. Co. v. Fuller's Exp. Co. (N. J.), 82 Atl. 894 (holding that if the shipper prepares the receipt and delivers it to the carrier the shipper is bound); Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955.

[51] Elliott R. R. (2d ed.), § 1510.

[52] Donlon v. Southern Pac. R. Co., 151 Cal. 763, 91 Pac. 603, 12 Am. & Eng. Ann. Cas. 1118 and note reviewing most of authorities; Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116; Bernard v. Adams Exp. Co., 205 Mass. 254, 91 N. E. 325, 18 Am. & Eng. Ann. Cas. 353 and note; Graves v. Lake Shore &c. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. 151.

gard to the value of the property, is invalid,[53] except, perhaps, in the few jurisdictions in which a carrier can contract for an exemption from liability for its own negligence. 3. The agreement as to value must be made in good faith and not forced upon the shipper by unreasonable rates for a higher valuation.[54] 4. A carrier may make reasonable regulations, graduating its compensation according to the value of the property and requiring a disclosure of such value for the purpose of fixing its compensation, and providing that, in case of the failure of the shipper to disclose the value as required, it shall be deemed not to exceed a certain specified sum.[55] 5. If the shipper, upon inquiry duly made by the carrier as to the value of the goods, gives a false valuation, in order to obtain reduced rates, and deceives the carrier thereby,

[53] Southern Exp. Co. v. Gibbs, 155 Ala. 303, 46 So. 465, 18 L. R. A. (N. S.) 874n, 130 Am. St. 24; Southern Exp. Co. v. Owens, 146 Ala. 412, 41 So. 752, 8 L. R. A. (N. S.) 369n, 119 Am. St. 41. "The fixing of a mere arbitrary sum, without any reference to the real value, and merely for the purpose of fixing the limit of the carrier's liability, will not ordinarily be held to be 'just and reasonable in the eye of the law.'" Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78, 138 Am. St. 768. See also, Southern Exp. Co. v, Marks, 87 Miss. 656, 40 So. 65, 112 Am. St. 466; Chicago &c. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. 587 and note; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955. See, as in case of embezzlement of the goods by the carrier's agent, Adams Exp. Co. v. Berry & Whitmore Co., 35 App. (D. C.) 208, 31 L. R. A. (N. S.) 309 and note. Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55.

[54] Louisville &c. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Overland Mail & Exp. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682; Louisville &c. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162, 1 Lewis Am. R. & Corp. Cas. 468.

[55] Graves v. Lake Shore &c. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Duntley v. Boston & M. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 3 Lewis Am. R. & Corp. Cas. 259; Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. 151. See George N. Pierce Co. v. Wells, 189 Fed. 561, 110 C. C. A. 645. Where a carrier accepted a box of ordinary appearance which contained jewelry worth several thousand dollars, and issued the ordinary express receipt, containing a clause limiting the company's liability to $50 in case of loss, unless a higher value was fixed by the shipper, and a higher rate of freight paid, and no value was fixed, and nothing was said about the value, and the shipper paid only $1.50 as freight, and after the box was carried to its destination a fire broke out in the company's warehouse before it had time to deliver the box, and though valuable freight was saved, there was no time to save ordinary freight, it was held that recovery could be had for more than $50 only in case of gross or wilful negligence. Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596. The carrier may, by accepting the package with knowledge of what it contains, estop himself from asserting the above mentioned provision of his receipt. Rathbone v. New York Cent. & H. R. R. Co., 140 N. Y. 48, 35 N. E. 418, revg. 69 Hun (N. Y.) 617, 23 N. Y. S. 1148.

he will be estopped by his fraud from claiming and recovering any greater amount in case they are lost or injured."[56]

If there has been an agreed valuation of the goods and the loss has been only partial, it is held that the shipper can recover only a proportionate part of the agreed value,[57] though some courts hold that the actual value of the portion destroyed may be recovered.[58] Sometimes it is stipulated that the carrier shall be liable in case of loss only for the value of the goods at the time and place of shipment. This is construed to mean the value when received by the carrier, including the amount paid for freight.[59] It is generally held that such a contract is valid,[60] since parties may lawfully limit the amount to be recovered, but other courts, recognizing that the usual measure of damages is the market value of the goods at the place of destination in good condition, hold this a limitation upon the carrier's liability which is invalid where the loss was caused by negligence.[61]

§ 190. **Effect in case of abandonment or completion of contract.**—When the owner stops the goods in transit, this ends the old contract of carriage, and if after that time the carrier

[56] Hayes v. Wells, 23 Cal. 185, 83 Am. Dec. 89; Chicago & A. R. Co. v. Shea, 66 Ill. 471; Rosenfeld v. Peoria &c. R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Ballon v. Earle, 17 R. I. 441, 22 Atl. 1113, 14 L. R. A. 433, 33 Am. St. 881; Shacht v. Illinois Cent. R. Co., 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176. See cases cited in note 44, § 173. But if there is no special contract limiting liability, the shipper is not bound to inform the carrier of the value of the goods without inquiry and the carrier is liable for the true value if no unfair means are used to deceive him, and no inquiry was made. Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. 151.

[57] United States Exp. Co. v. Joyce, 36 Ind. App. 1, 69 N. E. 1015, aff'd. 76 N. E. 1117. See 72 N. E. 865; Greenfield v. Wells, 134 N. Y. S. 913.

[58] Brown v. Cunard Steamship Co., 147 Mass. 58, 16 N. E. 717; Goodman v. Missouri &c. R. Co., 71 Mo. App. 460; Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Starnes v. Louisville &c. R. Co., 91 Tenn. 516, 19 S. W. 675.

[59] Pierce v. Southern Pac. R. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65 N. W. 458; Kelly v. Southern R. Co., 84 S. Car. 249, 66 S. E. 198, 137 Am. St. 842.

[60] Louisville &c. R. Co. v. Oden, 80 Ala. 38; Pierce v. Southern Pac. R. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; The Lydian Monarch, 23 Fed. 298; Merchants' & Miners' Transp. Co. v. Eichberg, 109 Md. 211, 71 Atl. 993, 130 Am. St. 524; Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65 N. W. 458.

[61] Illinois Cent. R. Co. v. Bogard, 78 Miss. 11, 27 So. 879; Ruppel v. Allegheny Valley R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. 666; Southern Pac. R. Co. v. D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813.

negligently delivers the goods, it has been held that the agreement limiting liability has been superseded by a new legal relation between the parties, and the owner can recover the actual loss.[62] So if the carrier converts the goods, he has abandoned the contract of shipment, and cannot rely upon it to lessen his liability.[63]

§ 191. **Limitation of time in which claim for loss must be made.**—A frequent stipulation in a carrier's receipt is that the carrier will be liable for no loss or damage to goods unless claim is made within a certain specified time, and usually in a certain manner, as in writing, or verified. These conditions are upheld by the courts where reasonable and based on a valid consideration,[64] since it is said that they are proper in order to enable the carrier to have a prompt opportunity to inform himself of the actual facts regarding the nature and extent of the loss before too great a time has elapsed, or to trace and recover lost property. Whether the condition is reasonable in a particular case depends mostly upon the time which in the ordinary course of business might be expected to elapse before the owner, using ordinary diligence, could present the notice,[65] and if the injury were such that the owner could not have discovered it until after the time for presenting notice mentioned in the receipt had passed, the condition as applied to such a case is not reasonable.[66] Stipulations

[62] Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

[63] Savannah &c. R. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219; Georgia &c. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807; United States Exp. Co. v. Joyce (Ind.), 72 N. E. 865 (See also, 76 N. E. 1117, 69 N. E. 1015). Where the goods were converted after the contract of carriage was completed, and the carrier sued for such conversion, he cannot claim benefit of a stipulation limiting the amount of recovery. Central R. Co. v. Chicago Portrait Co., 122 Ga. 11, 49 S. E. 727, 106 Am. St. 87.

[64] Elliott R. R. (2d ed.), § 1512 and cases cited; Atchison &c. R. Co. v. Temple, 47 Kans. 7, 27 Pac. 98, 13 L. R. A. 362; Selly v. Wilmington &c. R. Co., 113 N. Car. 588, 18 S. E. 88, 37 Am. St. 635; Pennsylvania R. Co. v. Shearer, 75 Ohio St. 249, 79 N. E. 431, 116 Am. St. 730 and note, 9 Am. & Eng. Ann. Cas. 15; Southern Exp. Co. v. Caldwell, 21 Wall. (U. S.) 264, 22 L. ed. 556; Houtz v. Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628n. A stipulation that claim must be made within reasonable time after delivery is valid. Deaver-Jeter Co. v. Southern R. Co. (S. Car.), 74 S. E. 1071.

[65] Kansas &c. R. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515; Baxter v. Louisville &c. R. Co., 165 Ill. 78, 45 N. E. 1003; Cox v. Vermont Cent. R. Co., 170 Mass. 129, 49 N. E. 97; International &c. R. Co. v. Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354.

[66] Louisville &c. R. Co. v. Steele, 6 Ind. App. 183, 33 N. E. 236; Atchison &c. R. Co. v. Temple, 47 Kans. 7, 27 Pac. 98, 13 L. R. A. 362; Oxley v. St. Louis, K. C. & N. R. Co., 65 Mo. 639; George v. Chicago, R. I. & P.

that notice of a claim for loss must be presented within three,[67] five,[68] ten,[69] thirty[70] and ninety[71] days from date of the receipt or the unloading of the stock, or that written notice must be given before stock is unloaded and mingled with others,[72] have, under the circumstances, been held reasonable. On the other hand thirty-six hours' time has been held unreasonable,[73] though in one case thirty hours' time was considered reasonable,[74] and under certain circumstances a period of thirty days has been held unreasonable.[75] The carrier may contract that in case of loss or injury to the goods suit shall be brought within a specified time less than that allowed by the statute of limitations, and, if the time is reasonable, such limitation will be enforced.[76] If the carrier has converted

R. Co., 214 Mo. 551, 113 S. W. 1099, 127 Am. St. 690. See Chicago, R. I. & P. R. Co. v. Spears, 31 Okla. 469, 122 Pac. 228.

[67] Lewis v. Great Western R. Co., 5 H. & N. 867; Oxley v. St. Louis, K. C. & N. R. Co., 65 Mo. 629.

[68] Black v. Wabash R. Co., 111 Ill. 351, 53 Am. Rep. 628; Anderson v. Lake Shore R. Co., 26 Ind. App. 196, 59 N. E. 396; Pennsylvania R. Co. v. Shearer, 75 Ohio St. 249, 79 N. E. 431, 116 Am. St. 730, 9 Am. & Eng. Ann. Cas. 15; Pavitt v. Lehigh &c. R. Co., 153 Pa. St. 302, 25 Atl. 1107.

[69] The Arctic Bird, 109 Fed. 167; Case v. Cleveland, C. C. & St. L. R. Co., 11 Ind. App. 517, 39 N. E. 426; Grieve v. Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192.

[70] United States Exp. Co. v. Harris, 51 Ind. 127; Weir v. Express Co., 5 Phila. (Pa.) 355; Southern Exp. Co. v. Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102; Liquid Carbonic Co. v. Norfolk &c. R. Co., 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753 and note.

[71] Broadwood v. Southern Exp. Co., 148 Ala. 17, 41 So. 769; Southern Exp. Co. v. Caldwell, 21 Wall. (U. S.) 264, 22 L. ed. 556. Or within four months after delivery. Atlantic Coast Line R. Co. v. Ward (Ala. App.), 58 So. 677.

[72] Roberts v. Georgia Southern R. Co. (Ga. App.), 72 S. E. 942; Wichita &c. R. Co. v. Koch, 47 Kans. 753, 28 Pac. 1013; Selly v. Wilmington &c. R. Co., 113 N. Car. 588, 18 S. E. 88, 37 Am. St. 635. Before mingling and within one day after delivery, St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. 75.

[73] Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394.

[74] St. Louis & S. F. R. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215.

[75] Southern Exp. Co. v. Bank of Tupelo, 108 Ala. 517, 18 So. 664; Southern Exp. Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118; Adams Exp. Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332. Stipulation that claim is to be made within thirty days after delivery or after due time for delivery is unreasonable. Gwyn Harper Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 38 S. E. 894, 83 Am. St. 675.

[76] Central Vermont R. Co. v. Soper, 59 Fed. 879, 8 C. C. A. 341; Gulf &c. R. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; Gulf &c. R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. 494. See Adams Exp. Co. v. Walker, 119 Ky. 121, 26 Ky. L. 1025, 83 S. W. 106, 67 L. R. A. 412, and Gulf &c. R. Co. v. Hume, 87 Tex. 211, 27 S. W. 110, for cases in which such a stipulation has not been upheld.

[77] Merchants' &c. Transp. Co. v. Moore, 124 Ga. 482, 52 S. E. 802; Chicago & S. E. R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43.

the goods,[77] or if they have never arrived at the destination,[78] the carrier cannot set up a stipulation that it was to be notified within a certain time after arrival of the goods at the destination, nor can it avail itself of such a stipulation if the goods were delivered to the wrong person.[79] So, it has been held that a claim for damages caused by delay need not be presented by notice, since in this case the carrier has all the information in its possession and the reason for notice is lacking.[80] And it has also been held that it is not necessary to give notice as a condition precedent to recovery for damages due to falling of the market.[81]

§ 192. When limitation does not apply—Waiver.—The carrier may waive compliance with the stipulation in regard to notice by inducing the shipper to delay presenting his claim,[82] by accepting a verbal notice or a notice defective in form,[83] by failing to insert in the contract sufficient information to enable

[77] Central R. Co. v. Pickett, 87 Ga. 734, 13 S. E. 750; Richardson v. Chicago & A. R. Co., 149 Mo. 311, 50 S. W. 782, 13 Am. & Eng. R. Cas. (N. S.) 170; Ward v. Missouri Pac. R. Co., 158 Mo. 226, 58 S. W. 28; Marrus v. New Haven Steamboat Co., 30 Misc. (N. Y.) 421, 62 N. Y. S. 474.

[78] Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 5 Am. & Eng. Ann. Cas. 97 and note; Ridgeway Grain Co. v. Pennsylvania R. Co., 228 Pa. 641, 77 Atl. 1007, 31 L. R. A. (N. S.) 1178 and note.

[79] Kramer v. Chicago, M. & St. P. R. Co., 101 Iowa 178, 70 N. W. 119; Atchison &c. R. Co. v. Poole, 73 Kans. 466, 87 Pac. 465; Wright v. Chicago, B. & Q. R. Co., 118 Mo. App. 392, 94 S. W. 555; Pecos &c. R. Co. v. Evans-Snyder-Buel Co., 42 Tex. Civ. App. 60, 93 S. W. 1024, affd. 100 Tex. 190, 97 S. W. 466.

[80] Houtz v. Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628.

[81] Hutchinson Carriers (3d ed.), § 444; Hudson v. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550; Merrill v. American Exp. Co., 62 N. H. 514; Bennett v. Northern Exp. Co., 12 Ore. 49, 6 Pac. 160. As where the carrier consumes more than the specified time in investigation of the claims, and promises before the expiration of the time that it will not take advantage of the limitation. Adams v. Colorado &c. R. Co., 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412. The limitation time was ten days, and the shipper next day told the carrier's agent he wanted to put in a claim. The agent told him to see another agent who sent him to a third and the third told the shipper to write him a letter. It was held that the limitation was complied with, though the shipper did not get the letter written within ten days. Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883.

[82] St. Louis, I. M. & S. R. Co. v. Jacobs, 70 Ark. 401, 68 S. W. 248; Chicago & A. R. Co. v. Grimes, 71 Ill. App. 397; Frankfurt v. Weir, 40 Misc. (N. Y.) 683, 83 N. Y. S. 112; Missouri &c. R. Co. v. Davis, 24 Okla. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866 and note. Stipulation that notice should be given in writing before the stock was unloaded is waived where the shipper telephoned to the carrier's agent before unloading the car that some animals were injured, and was told to get a veterinarian and the agent would settle.

the shipper to comply with the conditions of notice,[84] by having no agent to whom notice can be given,[85] or by failing to object to a claim, with knowledge, on the ground that it was not presented within the fixed time.[86] It has likewise been held waived when the carrier has actual notice within the stipulated time and does not raise the question of failure to present in the stipulated manner until time of trial.[87] If it is also provided in the receipt that no agent shall have power to waive any of its provisions, conduct by an agent in regard to notice of claim for loss which would ordinarily amount to a waiver may not estop the carrier.[88] It is held that where the carrier knew the goods were destroyed by fire while in its possession, there is no need for notice,[89] and the tendency of recent decisions seems to be to hold that where a carrier has actual notice of the loss within the time set by contract, it is not necessary that a formal claim should be made within that time, since the purpose of such notice of claim, that is, that the carrier may inform himself, has already been subserved.

§ 193. **Condition precedent and burden of proof.**—Some cases hold that compliance with notice is a condition precedent to the shipper's right to recover for injuries to goods, and to make out his case he must either show compliance or that the circumstances made the condition unreasonable.[90] The weight of au-

Gilliland v. Southern R. Co., 85 S. Car. 26, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. 861. Stipulation that notice shall be given in certain manner within certain time is waived where the carrier's agent examines the injury to goods to ascertain its extent, and after examination and ascertainment of the injury, directs the disposition of the goods, or promises adjustment. Kelly v. Southern R. Co., 84 S. Car. 249, 66 S. E. 198, 137 Am. St. 842.

[84] Wabash R. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Smitha v. Louisville &c. R. Co., 86 Tenn. 198, 6 S. W. 209; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Norfolk &c. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606.

[85] Carpenter v. Eastern R. Co., 67 Minn. 188, 69 N. W. 720; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Good v. Galveston &c. R. Co. (Tex.), 11 S. W. 854, 40 Am. & Eng. R. Cas. 98.

[86] Merchants' & Miners' Transp. Co. v. Eichberg, 109 Md. 211, 71 Atl. 993, 130 Am. St. 524.

[87] Eckert v. Pennsylvania R. Co., 211 Pa. St. 267, 60 Atl. 781, 107 Am. St. 571.

[88] Missouri &c. R. Co. v. Kirkham, 63 Kans. 255, 65 Pac. 261; Missouri &c. R. Co. v. Davis, 24 Okla. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866.

[89] Deaver-Jeter Co. v. Southern R. Co. (S. Car.), 74 S. E. 1071.

[90] Chicago & A. R. Co. v. Simms, 18 Ill. App. 68; Case v. Cleveland, C. C. & St. L. R. Co., 11 Ind. App. 517, 39 N. E. 426; Kalina v. Union Pac. R.

thority, however, seems to be to the effect that such a stipulation is a limitation upon the owner's rights, and that the carrier must as a matter of defense show that the condition was reasonable and that the owner failed to comply with it.[91] When it is proved that goods were injured in the possession of a carrier, the carrier usually has the burden of proving that a loss falls within a contract exception,[92] and in some jurisdictions he must show freedom from negligence,[93] but, by the weight of authority, when the carrier shows that the loss arose from an excepted cause, the burden is then upon the shipper to prove the carrier's negligence.[94]

§ 194. Effect of contract limitations in case of negligence.—The most of our courts, upon considerations of public policy, will not enforce a contract limiting liability for the negligence of a carrier or his servants.[95] But in some states the carrier may

Co., 69 Kans. 172, 76 Pac. 438; Pennsylvania R. Co. v. Shearer, 75 Ohio St. 249, 79 N. E. 431, 116 Am. St. 730, 9 Am. & Eng. Ann. Cas. 15.

[91] Hoye v. Pennsylvania R. Co., 191 N. Y. 101, 83 N. E. 586, 14 Am. & Eng. Ann. Cas. 414 and note, affg. 114 App. Div. (N. Y.) 821, 100 N. Y. S. 190; Cox v. Vermont Cent. R. Co., 170 Mass. 129, 49 N. E. 97; Ft. Worth &c. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834. See notes, 9 Am. & Eng. Ann. Cas. 17, and 14 Am. & Eng. Ann. Cas. 416.

[92] Elliott R. R. (2d ed.), § 1516; Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339 and note, 32 Am. St. 239; Parker v. Atlantic Coast Line R. Co., 133 N. Car. 335, 45 S. E. 658, 63 L. R. A. 827; Gaines v. Union Transp. & Ins. Co., 28 Ohio St. 418; Merchants' Dispatch Transp. Co. v. Block, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847.

[93] See cases cited in Elliott R. R. (2d ed.), § 1516; Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65 N. W. 458; Johnson v. Alabama &c. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 534; Mitchell v. Carolina Central R. Co., 124 N. Car. 236, 32 S. E. 671, 44 L. R. A. 515.

[94] Elliott R. R. (2d ed.), § 1516 and cases cited; Hutchinson Carriers (3d ed.), § 449; Insurance Co. of North America v. Lake Erie &c. R. Co., 152 Ind. 333, 53 N. E. 382; Patterson v. Clyde, 67 Pa. St. 500; Witting v. St. Louis R. Co., 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. 636; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955.

[95] Southern Exp. Co. v. Owens, 146 Ala. 412, 41 So. 752, 8 L. R. A. (N. S.) 369n; St. Louis, I. M. & S. R. Co. v. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. 99; Adams v. Colorado &c. R. Co., 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412; Summerlin v. Seaboard Air Line R. Co., 56 Fla. 687, 47 So. 557, 19 L. R. A. (N. S.) 191, 131 Am. St. 164; Southern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. 227; Chicago & N. W. R. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68 and note citing many authorities; Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Fisher v. Boston & M. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Southern Exp. Co. v. Rothenburg Co., 87 Miss. 656, 40 So. 65, 112 Am. St. 466; Baker v.

contract for exemption from any liability for negligence of his agents or servants,[96] in others from liability for other than gross negligence,[97] and he may contract that negligence shall not be presumed against the carrier, thus throwing the burden of proof of negligence upon the shipper.[98] No contract exempting from the consequences of negligence will be enforced by any court unless clear and explicit, and unless in plain terms it includes the exemption sought to be set up by the carrier.[99]

§ 195. Authority of shipper's or carrier's agent to limit liability.—If the shipper may agree to a limitation of liability, the person to whom he entrusts his goods to deliver to the carrier as his agent is presumed to have authority so to do, and even if he has no authority, but accepts the receipt, and the carrier does not know that he has no authority, the owner is usually held bound.[1] So if one carrier is made the shipper's agent to deliver to

Boston &c. R. Co., 74 N. H. 100, 65 Atl. 386, 124 Am. St. 937; Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433, 1 Am. & Eng. Ann. Cas. 672; Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. 674, 11 Lewis Am. R. & Corp. 642 and note; Eckert v. Pennsylvania R. Co., 211 Pa. St. 267, 60 Atl. 781, 107 Am. St. 571; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Hontz v. Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628.

[96] Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28. In the following states a carrier may contract with a gratuitous passenger against negligence of its servants: Connecticut, Griswold v. New York & N. E. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Louisiana, Higgins v. New Orleans &c. R. Co., 28 La. Ann. 133; Massachusetts, Quimby v. Boston & Maine R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, 1 Lewis Am. R. & Corp. 113; New Jersey, Kinney v. Central R. Co., 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265; Wisconsin, Annas v. Milwaukee &c. R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848. Louisiana, Massachusetts and New Jersey follow the general rule as to carriers of goods See cases cited in note 95.

[97] Donlon v. Southern Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811; Wabash &c. R. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Chicago & N. W. R. Co. v. Calumet Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68n; Lawson v. Chicago, St. P. M. & O. R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

[98] Merchants' & Miners' Transp. Co. v. Eichberg, 109 Md. 211, 71 Atl. 993, 130 Am. St. 524. The contrary was held in Southern Pac. Co. v. Phillipson (Tex. Civ. App.), 39 S. W. 958. And a contract that the goods are carried at the "owner's risk" does not prevent liability for negligence. Aaronson v. Pennsylvania R. Co., 23 Misc. (N. Y.) 666, 52 N. Y. S. 95; Nashville &c. R. Co. v. Jackson, 6 Heisk. (Tenn.) 271.

[99] Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Kenney v. New York Cent. R. Co., 125 N. Y. 422, 26 N. E. 626; Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28.

[1] Nelson v. Hudson River R. Co., 48 N. Y. 498; California Powder Works v. Atlantic &c. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A.

a succeeding carrier, it is such carrier's duty to accept reasonable limitations of liability by the succeeding carrier, and if it refuses to accept these, and in consequence of failure to ship, the goods are injured, the first carrier is liable to the owner.[2] But if a carrier has notice, which may be shown by circumstances, that an agent has no authority to bind the shipper by agreeing to a limitation of liability, the acceptance of a receipt, or signing of one by such agent, will not bind the owner,[3] but the latter may ratify the act of his agent in such a way as to be bound.[4] The consignor empowered to ship goods has, it is held, implied authority to make a contract to bind the consignee.[5] Carriers are bound by the acts of their agents in so far as they have been held out as having authority within the scope of their employment to bind the carrier.[6] This becomes of importance where the agent has made a contract which would increase the liability of the carrier. So it is held that a carrier's clerk may contract that freight shall be carried by a particular boat,[7] that certain instructions for delivery shall go with the goods,[8] or a station agent may contract that one in charge of animals may ride in the stock car,[9] and may bind the company to deliver beyond its terminus, and within a fixed time.[10]

§ 196. Construction of contracts limiting liability.—All contracts limiting liability are construed strictly against the carrier, and ambiguities are resolved against him.[11] The reason for

648 and note. Cases cited in note to Elliott R. R. (2d ed.), § 1507.

[2] Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394.

[3] Buckland v. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433, 1 Am. & Eng. Ann. Cas. 672 and note; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, affg. 52 Hun (N. Y.) 227, 5 N. Y. S. 140.

[4] Gulf &c. R. Co. v. Jackson, 99 Tex. 343, 89 S. W. 968.

[5] Brown v Louisville &c. R. Co., 36 Ill. App. 140; Trohlick v. Pennsylvania R. Co., 138 Mich. 116, 101 N. W. 223, 110 Am. St. 310; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589.

[6] Hutchinson Carriers (3d ed.), §§ 241, 460.

[7] Goddard v. Mallory, 52 Barb. (N. Y.) 87; Goodrich v. Thompson, 44 N. Y. 324.

[8] Hutchings v. Ladd, 16 Mich. 493.

[9] Lawson v. St. Paul &c. R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

[10] Denning v. Grand Trunk R. Co., 48 N. H. 455; Stron v. Detroit & M. R. Co., 23 Wis. 126, 99 Am. Dec. 114; Hansen v. Flint &c. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791.

[11] Elliott R. R. (2d ed.), § 1505 and cases cited; Hutchinson Carriers (3d ed.), § 464; Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. 45; Russell v. Erie R. Co., 70 N. J.

this is, that, as in the case of insurance companies,[12] the parties do not contract upon an equality, and the contract is usually prepared by the carrier in advance, so in order to escape any of his common-law liability, he must make the language of the agreement unmistakable to that effect. If the contract contains specific exemptions, followed by more general words, the general words are usually construed to embrace only things of the same kind as those specifically mentioned.[13]

Among examples of the construction of such contracts may be mentioned the following: Where a carrier had given two notices as to the terms of his carrying, he was bound by the one least beneficial to him.[14] A contract providing that the carrier would not be liable for loss or damage arising from causes incident to railroad transportation, nor from fire or elements, "while at depots," was held to refer only to depots where the cars might stop in transit, and not to the depot of destination, so that the carrier was liable for the goods which burned in the depot of destination.[15] A clause in a bill of lading exempting a ship from loss occasioned by latent defects in the machinery or hull of the vessel, not resulting from a want of due diligence, did not cover unseaworthiness existing at the time the voyage began, but referred only to unseaworthiness which might arise in the course of the voyage.[16] A contract by the shipper of horses that he would take

L. 808, 59 Atl. 150, 67 L. R. A. 433 and note, 1 Am. & Eng. Ann. Cas. 672; Hoye v. Pennsylvania R. Co., 191 N. Y. 101, 83 N. E. 586, 17 L. R. A. (N. S.) 641n, 14 Am. & Eng. Ann. Cas. 414; Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 38 S. E. 894, 83 Am. St. 675; Chicago, R. I. & P. R. Co. v. Spears, 31 Okla. 469, 122 Pac. 228.

[12] See Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

[13] The G. R. Booth, 91 Fed. 164, 33 C. C. A. 430, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. 9; Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179; Menzell v. Chicago & N. W. R. Co., 1 Dill. (U. S.) 531, Fed. Cas. No. 9429; Texas &c. R. Co. v. Callender, 183 U. S. 632, 46 L. ed. 362, 22 Sup. Ct. 257.

[14] St. Louis & S. E. R. Co. v. Smuck, 49 Ind. 302; Edsall v. Camden &c. R. Co., 50 N. Y. 661.

[15] E. O. Stannard Milling Co. v. Transit Co., 122 Mo. 258, 26 S. W. 704.

[16] The Aggi, 107 Fed. 300, 46 C. C. A. 276; The Sandfield, 92 Fed. 663, 34 C. C. A. 612; The Carib Prince, 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. 753. But the ship owner whose vessel is unseaworthy at the beginning of the voyage is liable only for damages caused by unseaworthiness, and not for damages caused by perils of the sea excepted in the contract. Seaworthiness is not a condition precedent to a contract of affreightment. The Europa (England 1908), p. 84. 13 Am. & Eng. Ann. Cas. 505 and cases cited in note.

all risks of loss, injury, damage or other contingencies in loading, conveyance, unloading and otherwise, did not exempt the company from liability for injury occasioned by the bottom falling out of a car, since such was not a risk incident to the ordinary transaction of business.[17] And where the shipper by contract exempted the carrier from "any and all damage that may occur to said goods, arising from leakage or decay, chafing or breakage, or from any other cause not the result of collision of trains, or of cars being thrown from the track while in transit," the company was held liable for the total loss of the goods by fire, because the word "damage" did not include total loss.[18] Where by arrangement between the parties the carrier was to take cotton from the platform of a compress company, and give a bill of lading under which the carrier was not liable for loss by fire while the cotton was in transit, or in depot or place of transshipment, or on landing at the place of delivery, and the cotton was burned, without negligence of the carrier, while still on the compress company's platform, the carrier was held liable, since none of the words or phrases in the exemption clause released liability while the cotton was on the platform, the court holding that, at the time, it was not "in transit," since transportation had not actually begun.[19] So a bill of lading excepting liability for losses by pirates, robbers and dangers of the road, among other exceptions, did not relieve the carrier when the goods were stolen from a railroad truck, for robbers are those who take by force, not stealth, and dangers of the road are such dangers as carriages overturning, resulting from the physical nature of the roads, not theft, and theft or larceny was not included among the exceptions.[20] Where the bill excepted liability for losses by thieves, and a box of diamonds was stolen, whether on the ship during the voyage or on arrival in port before delivery not being shown, it was held that the word "thieves" in the exemption was limited, as in policies of insurance, to persons outside the ship, and since from the evidence the box may have been stolen by one on the ship, the shipowner

[17] Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179.

[18] Menzel v. Chicago & N. W. R. Co., 1 Dill. (U. S.) 531, Fed. Cas. No. 9429.

[19] Amory Mfg. Co. v. Gulf &c. R. Co., 89 Tex. 419, 37 S. W. 856, 59 Am. St. 65.

[20] De Rothschild v. Royal Mail Steam Packet Co., 7 Exch. 734.

was liable.[21] Limitation of liability to a certain amount for each package of goods does not apply to bales of cotton, for they are not packages within the meaning of the stipulation.[22] And where goods were carried partly by rail and partly by water, loss by fire on land was not within an exemption for damages "by fire or collision on the rivers or sea."[23] Where the contract was that "any alteration, addition or erasure in the bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing the bill shall be void," the court held that this clause did not prevent fraudulent alterations making the entire contract void, in accordance with the general rule of contracts.[24]

§ 197. Construction of exceptions found in bills of water carriers.—The exception, usually found in bills of lading of water carriers, whether upon the high seas or upon rivers, from liability for losses caused by perils of the sea or dangers of navigation, includes many perils not included in the legal exception of the act of God, among them many in which human agency is in part responsible, such as collisions, if the carrier is not negligent and has used reasonable skill and diligence.[25] A jettison made necessary by a tempest, and not by the fault of the master of the ship, is a peril of the sea.[26] A hidden obstruction of recent origin in a navigable stream, unknown and such that human foresight cannot reasonably guard against it, is considered a peril of the sea, or a danger of navigation.[27] The waves made by a steamer passing a flatboat are perils of the river,[28] and it is even held that the breaking of a rope by which a ship unloading was made to cant and take water is a peril of the sea.[29] Among other perils

[21] Taylor v. The Liverpool & Great Western Steam Company, L. R. 9. Q. B. 546.

[22] Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140.

[23] Little Rock &c. R. Co. v. Talbot, 39 Ark. 523.

[24] Merchants' Nat. Bank v. Baltimore C. & R. Steamboat Co., 102 Md. 573, 63 Atl. 108.

[25] The Xantho, 12 App. Cas. 503; Garston v. Hickie, 18 Q. B. Div. 17.

[26] The Bergenseren, 36 Fed. 700; The Marlborough, 47 Fed. 667; Gillett v. Ellis, 11 Ill. 579; Lawrence v. Minturn, 17 How. (U. S.) 100, 15 L. ed. 58; The Portsmouth, 9 Wall. (U. S.) 682, 19 L. ed. 754.

[27] Redpath v. Vaughan, 52 Barb. (N. Y.) 489; Chouteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 602; Johnson v. Friar, 4 Yerg. (Tenn.) 47, 26 Am. Dec. 215.

[28] Washington Mutual Ins. Co. v. Reed, 20 Ohio 199.

[29] Laurie v. Douglass, 15 M. & W. 746.

are sea water entering through a ventilator hold, the ventilator having been carried away by a gale,[30] the drifting away by a gale of logs brought alongside to be loaded,[31] a stanchion falling in heavy weather,[32] cattle in a lighter becoming violent and drowning.[33] Losses by fire are not perils of the sea.[34] Damage by sea water is not, if caused by unseaworthiness, the negligence of the master or crew, or ordinary wear and tear, a damage by a peril of the sea, but if caused by unusual stress of weather, it is.[35] The following have been held not perils of the sea: a rush of water caused by an explosion of blasting caps,[36] damage caused by rats gnawing a hole in a water pipe, whereby the cargo was damaged by water,[37] or injury caused to the ship by worms.[38]

§ 198. Act of carrier which prevents taking advantage of contract limitations—Deviation or departure from contract.—We have seen that in most jurisdictions the carrier loses the benefit of contract exemptions from liability if the negligence of himself or his servants has caused injury to the goods.[39] Even where the carrier may contract against negligence, he cannot contract against positive misfeasance of himself or his servants, or conversion of the goods.[40] If he departs from the stipulated method of carriage or breaks the contract in any way, he can usually claim no benefit from contract exemptions, but becomes liable under the common law, as, it has been held, where a vessel unauthorizedly deviates from her course,[41] or the contract is to

[30] The Dunbritton, 73 Fed. 352, 19 C. C. A. 449.

[31] Munson S. S. Line v. Steiger, 132 Fed. 160, 69 C. C. A. 492, affd. 136 Fed. 772.

[32] The Exe, 57 Fed. 399, 6 C. C. A. 410.

[33] Anthony v. Ætna Ins. Co., 1 Abb. (U. S.) 343.

[34] Parsons v. Monteath, 13 Barb. (N. Y.) 353; Swindler v. Hilliard, 2 Rich. (S. Car.) 286; Garrison v. Memphis Ins. Co., 19 How. (U. S.) 312; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344.

[35] The Folmina, 212 U. S. 354, 53 L. ed. 546, 29 Sup. Ct. 363, 15 Am. & Eng. Ann. Cas. 748 and note.

[36] The G. R. Booth, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. 9.

[37] The Euripides, 71 Fed. 728, 18 C. C. A. 226.

[38] The Giles Loring, 48 Fed. 463.

[39] See cases cited under note 95.

[40] Chicago & S. E. R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608.

[41] Thorley v. Orchis Steamship Co., 1 K. B. 660, 7 Am. & Eng. Ann. Cas. 281 and note; Waltham Mfg. Co. v. New York &c. Steamship Co., 204 Mass. 253, 90 N. E. 550, 17 Am. & Eng. Ann. Cas. 837 and note; Empire State Cattle Co. v. Atchison &c. R. Co., 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. 607, 15 Am. & Eng. Ann. Cas.

carry by rail entirely, but he carries partly by steamboat,[42] or sends goods by sea when the agreement was to carry by canal,[43] or changes the goods to another car when he contracted to carry them through without change,[44] or refuses to give free transportation as contracted to the attendant of live stock,[45] or fails to care for goods when he has contracted to do so,[46] or agrees to send them by passenger trains, and instead sends them by freight trains.[47] Usage may be resorted to in a proper case in order to explain the contract and determine whether there has been a departure.[48]

§ 199. **When connecting carrier obtains benefits of contract made by initial carrier.**—If the first carrier has contracted only to carry to the terminus of his own route, and deliver to another carrier, the succeeding carrier can take no advantage of the contract made by the first.[49] If the first carrier makes a through contract to carry the goods to their final destination, the succeeding carriers are usually entitled to the exemption contracted for by the first.[50]

§ 200. **What law governs construction of contract limiting carrier's liability.**—As the general rule is that the lex loci contractus governs in the determination of the rights of the parties in construing a contract, so the general rule as to contracts of carriage is that a contract made in one state and partly to be performed there is governed by the law of that state, unless there is evidence to the contrary.[51] A contract of carriage to be per-

70 and note (not an insurer if necessity requires deviation).

[42] Maghee v. Camden R. Co., 45 N. Y. 514, 6 Am. Rep. 124.

[43] Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54n.

[44] Robinson v. Merchants' Despatch Transp. Co., 45 Iowa 470.

[45] McKahan v. American Exp. Co., 209 Mass. 270, 95 N. E. 785, Am. & Eng. Ann. Cas. 1912B, 612 and note.

[46] Hunnewell v. Taber, Fed. Cas. No. 6880, 2 Sprague Dec. (U. S.) 1.

[47] Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302, 25 Atl. 1107.

[48] Robertson v. National Steamship Co., 139 N. Y. 416, 34 N. E. 1053.

[49] Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473; Bancroft v. Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482; Manhattan Oil Co. v. Camden R. Co., 54 N. Y. 197; Babcock v. Lake Shore &c. R. Co., 49 N. Y. 491.

[50] See cases cited in last note. Kansas City &c. R. Co. v. Sharp, 64 Ark. 115, 40 S. W. 781; Western &c. R. Co. v. Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102n; Robinson v. New York &c. Steamship Co., 63 App. Div. (N. Y.) 211, 71 N. Y. S. 424, affd. 177 N. Y. 565, 69 N. E. 1130; Maghee v. Camden R. Co., 45 N. Y. 514, 6 Am. Rep. 124.

[51] Hutchinson Carriers (3d ed.), § 201 et seq.; Elliott R. R. (2d ed.),

formed entirely within one state is, of course, governed wholly by the law of that state.[52] Matters relating to delivery, solely, are determined by the law of the state of delivery.[53] The remedy is governed by the law of the forum, as the time within which the suit may be brought, or the admissibility of evidence.[54] The performance of a contract of carriage is considered indivisible by the best authority.[55] Mr. Hutchinson says that there is a presumption that the parties intended the law to govern which will give validity to all the provisions of the contract,[56] and if such would not be done by the lex loci contractus, the question becomes entirely one of evidence, and, as bearing upon it, it may be shown that the state of the performance of the contract is the legal residence of the parties,[57] that the performance was to be entirely in another state from that of the contracting,[58] that the forms of the contract were those used in some particular state,[59] or that there was a stipulation that the contract was made with reference to the

§ 1506; Southern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. 227; Cleveland, C. C. & St. L. R. Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 26 Ky. L. 103, 66 L. R. A. 275, 4 Am. & Eng. Ann. Cas. 1102 and note; Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78, 138 Am. St. 768; Hughes v. Pennsylvania R. Co., 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. 713; Gilliland v. Southern R. Co., 85 S. Car. 26, 67 S. E. 20, 137 Am. St. 861; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 269, 24 Sup. Ct. 132; Liverpool &c. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469; note 88 Am. St. 125.

[52] In re Missouri Steamship Co., 42 Ch. Div. 321, 58 L. J. Ch. (N. S.) 721, 61 L. T. (N. S.) 316; Grand v. Livingston, 4 App. Div. (N. Y.) 584, 73 N. Y. St. 646, 38 N. Y. S. 490; Brown v. Camden &c. R. Co., 83 Pa. St. 316; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589.

[53] Southern Exp. Co. v. Gibbs, 155 Ala. 303, 46 So. 465, 130 Am. St. 24; Herf & Frerichs Chem. Co. v. Lackawanna Line, 70 Mo. App. 274, 100 Mo. App. 164, 73 S. W. 346; Springs v. South Bound R. Co., 46 S. Car. 104, 24 S. E. 166.

[54] The Guildhall, 58 Fed. 796; Adams Exp. Co. v. Walker, 119 Ky. 121, 26 Ky. L. 1025, 83 S. W. 106, 67 L. R. A. 412; Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

[55] Hutchinson Carriers (3d ed.), § 210 and cases cited; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469.

[56] Hutchinson Carriers (3d ed.), § 213; Talbott v. Merchants' Dispatch Transp. Co., 41 Iowa 247, 20 Am. Rep. 589; Hazel v. Chicago, M. & St. P. R. Co., 82 Iowa 447, 48 N. W. 926; Grand v. Livingston, 4 App. Div. (N. Y.) 584, 38 N. Y. S. 490; Ryan v. M. K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589. Contra, Brockway v. American Exp. Co., 171 Mass. 158, 50 N. E. 626.

[57] Herf & Frerichs Chem. Co. v. Lackawanna Line, 70 Mo. App. 274, 100 Mo. App. 164, 73 S. W. 346; Grand v. Livingston, 4 App. Div. (N. Y.) 584, 38 N. Y. S. 490; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469.

[58] See cases cited in note 52, § 200.

[59] In re Missouri Steamship Co., L. R. 42 Ch. Div. 321, 58 L. J. Ch. (N. S.) 721, 61 L. J. (N. S.) 316.

law of a certain state.[60] The general rule is that a court will enforce a limitation in a contract which is valid in another state if the contract is to be considered as governed by the laws of such other state, though it is not valid in the state of the forum,[61] unless it be contrary to public policy in the state of the forum.[62] If a foreign law is relied upon, proof of it must be made, or the matter will be decided in conformity with the law of the state of the forum.[63]

§ 201. Consideration for contract limiting liability.—As any contract must be supported by a sufficient consideration, so contracts limiting the liability of carriers cannot be supported without a good or valuable consideration. It is obvious that the carrier receives a consideration in the lessening of his risk. It is not so easily seen what is the consideration to the shipper, since a carrier is compelled to carry without limitation of liability upon demand and tender of compensation.[64] It is said that the presumption of law is that the compensation of the carrier has been reduced in consideration of the reduced liability, and it will take clear and satisfactory evidence to show that no

[60] Hutchinson Carriers (3d ed.), § 214.

[61] See Elliott R. R. (2d ed.), § 1494; Thomas v. Wabash &c. R. Co., 63 Fed. 200, affd. 71 Fed. 481, 19 C. C. A. 88; Hazel v. Chicago, M. & St. P. R. Co., 82 Iowa 477, 48 N. W. 926; Tecumseh Mills v. Louisville &c. R. Co., 108 Ky. 572, 22 Ky. L. 264, 57 S. W. 9, 49 L. R. A. 557; O'Regan v. Cunard Steamship Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. 484; note 63 L. R. A. 513. The federal courts treat the question as one of general commercial law, and decide matters connected with the limitation of carriers' liability without regard to the law of particular states. New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. 151; Liverpool &c. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469. But they will apply a state statute. Central of Georgia R. Co. v. Kavanaugh, 92 Fed. 56, 34 C. C. A. 203.

[62] Southern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. 227; Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78, 138 Am. St. 768; note 88 Am. St. 128; Hughes v. Pennsylvania R. Co., 202 Pa. 222, 51 Atl. 990, 97 Am. St. 713.

[63] Pierce v. Southern Pac. R. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; Palmer v. Atchison &c. R. Co., 101 Cal. 187, 35 Pac. 630; Meuer v. Chicago, M. & St. P. R. Co., 5 S. Dak. 568, 59 N. W. 945, 25 L. R. A. 81, 49 Am. St. 898, 11 S. Dak. 94, 75 N. W. 823, 74 Am. St. 774.

[64] See cases cited under first note 8, this chapter. A recent United States case holds that if the stipulation is just and reasonable, there is no necessity for an alternative choice or independent consideration. Arthur v. Texas & P. R. Co., 139 Fed. 127, 71 C. C. A. 391, revd. 204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. 338. A bill of lading limiting a carrier's liability does not apply to damages already

reduced rate was given,[65] but when it is satisfactorily shown that the rate was the same as for shipments made under full liability, then, since there would seem to be no consideration and the limitation would be unenforcible, some courts take the view that unless it is shown that a reduced rate was allowed, the contract limiting liability must fail for want of consideration.[66] A recital in the contract that the rate is reduced is not conclusive,[67] and the Minnesota Supreme Court has held that if the shipment is for interstate carriage, where rebates are prohibited, no rebate could be presumed, and the carrier was fully liable, in spite of the limitations of the contract.[68]

accrued, unless there is a separate consideration therefor. St. Louis, I. M. & S. R. Co. v. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. 99.

[65] Elliott R. R. (2d ed.), § 1504; McMillan v. Michigan S. R. Co., 16 Mich. 79, 93 Am. Dec. 208; York Mfg. Co. v. Illinois Cent. R. C., 3 Wall. (U. S.) 107, 18 L. ed. 170; Courteen v. Kanawha Dispatch Co., 110 Wis. 610, 86 N. W. 176, 55 L. R. A. 182.

[66] Kellerman v. Kansas City &c. R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Phœnix Powder Mfg. Co. v. Wabash R. Co., 196 Mo. 663, 94 S. W. 235.

[67] St. Louis, I. M. & S. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Wehmann v. Minneapolis &c. R. Co., 58 Minn. 22, 59 N. W. 546, 61 Am. & Eng. R. Cas. 273.

[68] Wehrnam v. Minneapolis &c. R. Co., 58 Minn. 22, 59 N. W. 546, 61 Am. & Eng. R. Cas. 273.

CHAPTER XIII.

THE CARRIER'S RIGHTS.

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§ 202. **Compensation.**—The carrier has a right to reasonable compensation for the services performed in the carriage of the goods, and for the risk assumed in so doing, and this is one manner in which he is distinguished from a gratuitous bailee. He may demand payment of a reasonable compensation in advance before accepting the goods; if he does not, he may, after the carriage is performed, recover the agreed amount, or, in the absence of agreement, a reasonable amount. The party liable for the freight charges may, however, if sued, set off loss

[1] Little Rock &c. R. Co. v. St. Louis &c. R. Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192; Randall v. Richmond & D. R. Co., 108 N. Car. 612, 13 S. E. 137, 49 Am. & Eng. R. Cas. 74; Knight v. Providence & Worcester R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90. The right may be waived by accepting goods without exacting payment in advance. Gratiot St. Warehouse Co. v. Missouri K. & T. R. Co., 124 Mo App. 11, 102 S. W. 11.

or damages to the goods, or loss caused by delay or deviation.[2] If the damages exceed the amount of freight, the consignee may rightfully demand delivery without payment of freight, and refusal to surrender possession is conversion.[3]

§ 203. On what goods entitled to freight.—The general rule is that the carrier is entitled to freight only on the goods delivered, in the absence of an express contract to the contrary, or a contract for the payment of a lump sum.[4] If part of the goods have been lost from causes from which he is exempt from liability for loss, either under the common law or by special contract, he is generally entitled to freight upon those delivered, but not upon those lost.[5] But if the owner has prevented the completion of the contract of transportation, the carrier is entitled to full freight, if not in fault, and able and willing to complete the contract.[6] The act of God in delaying the journey does not, it seems, justify the owner in terminating the contract of carriage.[7] If the goods have been damaged from internal decay, perils of the sea, or other causes of loss for which the carrier is not responsible, he is entitled to full freight, if he delivers them, or if the owner receives them before the journey is completed.[8]

[2] Elliott R. R. (2d ed.), § 1558; Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co., 73 Kans. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058n, 117 Am. St. 468, 9 Am. & Eng. Ann. Cas. 790 and note; Hill v. Leadbetter, 42 Maine 572, 66 Am. Dec. 305; Gleadell v. Thompson, 56 N. Y. 194.

[3] Missouri Pac. R. Co. v. Peru-Van Zandt Co., 73 Kans. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058n, 117 Am. St. 468, 9 Am. & Eng. Ann. Cas. 790 and note. Contra, Willensky v. Central of Ga. R. Co., 136 Ga. 889, 72 S. E. 418, Ann. Cas. 1912D. 271, and see note.

[4] The Tangier, 32 Fed. 230; Gibson v. Brown, 44 Fed. 98; New York Cent. & H. R. R. Co. v. Standard Oil Co., 87 N. Y. 486; Cottrell v. Carolina &c. R. Co., 141 N. Car. 383, 54 S. E. 288; The Brig Collenberg, 1 Black. (U. S.) 170, 17 L. ed. 89.

[5] See cases cited ante, note 4.

[6] Gage v. Maryland Coal Co., 124 Mass. 442; Braithwaite v. Power, 1 N. Dak. 455, 48 N. W. 354; The Gazelle, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. 139.

[7] Wood v. Hubbard, 62 Fed. 753, 10 C. C. A. 623.

[8] McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Griswold v. New York Ins. Co., 3 Johns. (N. Y.) 321, 3 Am. Dec. 490; Steelman v. Taylor, 3 Ware (U. S.) 52, Fed. Cas. No. 13349. Compare Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co., 73 Kans. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 87 Am. St. 468, 9 Am. & Eng. Ann. Cas. 790 and note.

§ 204. **Amount of compensation.**—This may be regulated by statute,[9] or depend upon usage,[10] or be governed by contract between the parties,[11] but if not determined by the statutory rate, or the customary rate, or the contract rate, the carrier is entitled to receive a reasonable compensation, the amount of which is a question of fact.[12] In but few cases, however, is it necessary to settle this question, since the rate is ordinarily fixed in one of the three ways first mentioned.

§ 205. **Shipper's rights if charges unreasonable.**—If the shipper believes the charge unreasonable, he may tender what he believes to be a reasonable amount, and, if this is not accepted, sue the carrier for refusal to carry,[13] or if the goods have been carried, he may tender what he believes a reasonable amount, and sue to recover the goods if this is refused.[14] A more common method is to pay the charges, under protest that they are unreasonable, and thus having recovered the goods, to bring an action to recover the money illegally demanded and paid, as paid under compulsion.[15]

§ 206. **Carrier's rights in case of fraud by shipper.**—If the shipper, by fraud, falsely represents to the carrier that the goods are of a class which are carried at a lower rate, and the carrier without notice accepts them, the carrier may, upon discovering before delivering the goods that they are of a class upon which a higher rate should have been paid, charge the excess

[9] Hutchinson Carriers (3d ed.), § 574.

[10] London &c. R. Co. v. Evershed, L. R. 3 App. Cas. 1029; Killmer v. New York Cent. & H. R. R. Co., 100 N. Y. 395, 3 N. E. 594, 53 Am. Rep. 194.

[11] Blackshere v. Patterson, 72 Fed. 204, 18 C. C. A. 508.

[12] London &c. R. Co. v. Evershed, L. R. 3 App. Cas. 1029; Louisville &c Consolidated R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341, 132 Ind. 517, 32 N. E. 311, 4 L. R. A. 244n, 18 L. R. A. 105.

[13] Hutchinson Carriers (3d ed.), § 805; Carr v. Lancashire &c. R. Co., 7 Exch. 707. The acceptance by the interstate commerce commission of a rate determines that it is not unreasonable as against a shipper suing to recover unreasonable freight charges on an interstate shipment. Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

[14] Hutchinson Carriers (3d ed.), § 805.

[15] Elliott R. R. (2d ed.), § 1564; Chicago, St. L. & P. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Clegg v. Southern R. Co., 135 N. Car. 148, 47 S. E. 667, 65 L. R. A. 717.

against the goods.[16] If no inquiry is made concerning the character of the goods, and no misrepresentations are made, or if by mistake the carrier agrees to carry at a lower rate, and the shipper accepts without notice, the carrier would be bound to carry at the agreed rate, and cannot exact more before delivery, in the absence of any governing provision in the Interstate Commerce Act, or state statute.[17]

§ 207. **Who must pay the freight.**—The consignee is presumptively the owner of the goods, and prima facie liable for the freight, and, if he accepts, he is under an implied promise by law to pay.[18] If he does not accept the goods, the fact that he is named as consignee does not necessarily make him liable.[19] If the consignee indorses the bill of lading, and assigns it before delivery of the goods, it seems that the assignee is primarily liable for the freight,[20] and that the consignee could be held only if the indorsee received them as his agent.[21] If it is shown that the carrier knew that the consignee was merely the agent of the shipper, he does not assume an implied contract to pay freight by receiving the goods, and only the consignor, if the owner of the goods, is liable.[22] So, if goods are consigned to the care of one person for another, he does not ordinarily become liable for freight by receiving the goods.[23] The shipper is bound for the freight as soon as the goods have been delivered and accepted by the carrier for carriage, and the consignee may be deemed

[16] Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. 108.

[17] Central of Georgia R. Co. v. Gortatowsky, 123 Ga. 366, 51 S. E. 469; Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. 108; United States Exp. Co. v. Koerner, 65 Minn. 540, 68 N. W. 181, 33 L. R. A. 600; Baldwin v. Liverpool &c. Steamship Co., 11 Hun (N. Y.) 496, affd. 74 N. Y. 125, 30 Am. Rep. 277; Borden v. Richmond &c. R. Co., 113 N. Car. 570, 18 S. E. 392, 37 Am. St. 632. See Fine v. Southern Exp. Co. (Ga. App.), 73 S. E. 35.

[18] Wegener v. Smith, 15 C. B. 285; North German Lloyd v. Heule, 44 Fed. 100, 10 L. R. A. 814; Davison v. City Bank, 57 N. Y. 81. But see Union Freight R. Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. 398, 55 Am. & Eng. R. Cas. 695.

[19] Coleman v. Lambert, 5 M. & W. 502; Central R. Co. of New Jersey v. MacCartney, 68 N. J. L. 165, 52 Atl. 575; Hinsdell v. Weed, 5 Denio (N. Y.) 172.

[20] Cock v. Taylor, 13 East 399.

[21] Tobin v. Crawford, 5 M. & W. 234.

[22] Amos v. Temperley, 8 M. & W. 798; Boston & M. R. Co. v. Whitcher, 1 Allen (Mass.) 497; Elwell v. Skiddy, 77 N. Y. 282; Sheets v. Wilgus, 56 Barb. (N. Y.) 662; Spencer v. White, 1 Ired. L. (N. Car.) 236.

[23] Amos v. Temperley, 8 M. & W. 798.

merely the shipper's agent to pay the freight, to the carrier, and the carrier's remedy against the consignee is not exclusive, but he has also recourse against the shipper[24] even if the bill of lading contains the clause "he (consignee) paying the freight," unless he has lost this right by making a new contract with the consignee, as by extending the time for payment, or accepting a promissory note.[25]

§ 208. **Method of calculating compensation.**—If freight is to be paid according to the bulk of the goods, and the bulk or weight increases during the voyage, it is held that the measurement of the bulk at the time of shipment and not at the time of delivery is that upon which the carrier's compensation is to be computed. This has been held where wheat expanded by heat,[26] or where cotton bales expanded in the ship's hold,[27] and when the freight was to be computed by weight[28] or upon the number of bushels.[29] The general rule is that freight is calculated upon the quantity of goods shipped, carried and delivered, and that all these conditions must concur, so if the goods decrease in quantity, the carrier can recover only freight upon the quantity delivered. Since he is not allowed to gain either by increase or decrease of bulk or weight, he may contract against loss from decrease by natural causes.[30]

§ 209. **Freight pro rata itineris.**—The general rule is that the carrier, in order to receive his compensation, must deliver the goods to the consignee at the original destination, or the owner must have prevented such delivery by reclaiming the goods before such delivery, in either of which cases the carrier is entitled to full freight for the entire distance.[31] Where the carrier is prevented by disaster or otherwise from proceeding upon his journey, we have seen that it may become his duty to forward the

[24] Great Western R. Co. v. Bagge & Co., L. R. 15 Q. B. Div. 625, 23 Am. & Eng. R. Cas. 715; Portland Flouring Mills v. British Ins. Co., 130 Fed. 860, 65 C. C. A. 344; Central R. Co. v. MacCartney, 68 N. J. L. 165, 52 Atl. 575.

[25] Strong v. Hart, 6 B. & C. 160; Tapley v. Martens, 8 T. R. 451.

[26] Gibson v. Sturge, 10 Exch. 622.

[27] Strand v. Grant, 15 C. B. (N. S.) 323; Buckle v. Knoop, 2 L. R. Exch. 124, 333.

[28] Nine Thousand &c. Dry Hides, 6 Ben. (U. S.) 199.

[29] Allen v. Bates, 1 Hilt. (N. Y.) 221.

[30] Hutchinson Carriers (3d ed.), § 813.

[31] See cases cited ante, notes 1 and 6.

goods by another carrier,[32] and if they arrive within a reasonable time, he is entitled to full freight.[33] But he and the owner may agree that the goods shall be redelivered to the owner, at the place where the carrier has already transported them, and if the owner voluntarily takes the goods back at such place, an agreement is implied to pay the carrier a proportionate part of the entire charges, or, as it is termed, freight pro rata itineris.[34] The acceptance must be voluntary by the owner, and must arise from a desire to take back the goods, and not merely because the circumstances make it necessary for him to take them rather than lose them,[35] and whether the acceptance was voluntary, made as a result of choice, is to be determined by the circumstances and conduct of the parties if there is no express agreement.[36] If the carrier's vehicle has been so damaged that he cannot fulfil his contract, and he refuses to repair, to send the goods by another, or to get another vehicle, no choice is present to the owner, and an acceptance by him is not considered voluntary unless there is an express agreement. If, however, the carrier was able and willing to send the goods, or to complete the journey after repairs, or if the owner would gain in any way by accepting the goods at the intermediate point, there would be strong evidence of choice.[37] An agent may accept for the owner.[38] If the goods have been sold without consulting with the owner, although the owner has accepted the proceeds, this is not the same as accepting the goods, and he is not estopped from denying the claim for freight, and if the sale was made without authority, the carrier is not entitled to any claim for freight.[39] The same rule has been applied when

[32] See cases cited in note 83, § 163.

[33] Hutchinson Carriers (3d ed.), § 814.

[34] Elliott R. R. (2d ed.), § 1562; Hutchinson Carriers (3d ed.), § 814; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; note to Crawford v. Williams, 60 Am. Dec. 146, 153; Barrell v. Propeller Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406.

[35] McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175; Welch v. Hicks, 6 Cow. (N. Y.) 504, 16 Am. Dec. 443; Braithwaite v. Power, 1 N. Dak. 455, 48 N. W. 354; Crawford v. Williams, 1 Sneed (Tenn.) 205, 60 Am. Dec. 146 and note.

[36] Hutchinson Carriers (3d ed.), § 816; Gray v. Waln, 2 S. & R. (Pa.) 229, 7 Am. Dec. 642.

[37] Hutchinson Carriers (3d ed.), § 816.

[38] Smyth v. Wright, 15 Barb. (N. Y.) 51; Barrell v. Propeller Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406.

[39] Hunter v. Prinsep, 10 East 378; Escopmiche v. Stewart, 2 Conn. 391; Penoyer v. Hollett, 15 Johns. (N. Y.) 332, 8 Am. Dec. 239; Armroyd v.

there was an authority to sell, as when the ship was disabled there was not any prospect of being able to forward the goods, which were perishable, and sale was necessary to preserve them.[40] When a contract of carriage has not yet been completed, and war arises between the carrier's nation and the nation to which the goods are to be carried, the carrier may decline to complete the voyage, if such would subject the goods to risk of capture, and may recover pro rata freight if the service performed has been of value to the shipper.[41]

§ 210. **Method of calculating freight pro rata itineris.**— The rule followed in this country for adjusting pro rata freight is to allow in proportion to the amount of the journey completed at the place where the owner accepts the goods,[42] and does not depend on the question of the amount of benefit received by the shipper.[43] Where the carrier is compelled from necessity to reship the goods by another carrier, he may pay any price for the carriage that may be necessary under the circumstances and seems proper to him to pay. The shipper, it is held, will be bound to the second carrier for the freight in excess of that originally contracted to be paid, and the second carrier will have a lien upon the goods for his charges,[44] but neither shipper nor goods would be liable for both the excess and the original contract price, and if the freight for completing is less than the original contract-price for the entire journey, the shipper must pay the first carrier the difference; if the second carrier's price is greater than the original price, the shipper must pay him, but the first carrier gets nothing.[45]

Union Ins. Co., 3 Binn. (Pa.) 437; Callender v. Insurance Co. of N. America, 5 Binn. (Pa.) 525; Caze v. Baltimore Ins. Co., 7 Cranch. (U. S.) 358, 3 L. ed. 370; Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664.

[40] Vlierboom v. Chapman, 13 M. & W. 230; Richardson v. Young, 38 Pa. St. 169; Hugg v. Augusta Ins. Co., 7 How. (U. S.) 595.

[41] The Teutonia, L. R. 3 Adm. 394.

[42] 3 Kent's Com. 230; United Ins. Co. v. Lenox, 1 Johns. Cas. (N. Y.) 377, 2 Johns. Cas. (N. Y.) 443; Smyth v. Wright, 15 Barb. (N. Y.) 51; Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 323; Barrell v. Propeller Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406.

[43] Coffin v. Storer, 5 Mass. 252, 4 Am. Dec. 54.

[44] Searle v. Scovell, 4 Johns. Ch. (N. Y.) 218.

[45] Hugg v. Baltimore &c. Mining Co., 35 Md. 414; Clark v. Massachusetts Fire & Marine Ins. Co., 2 Pick. (Mass.) 104, 13 Am. Dec. 400; Searle v. Scovell, 4 Johns. Ch. (N. Y.) 218; Griswold v. New York Ins. Co., 3

§ 211. Transhipment at rate different from original rate agreed upon.—If the carrier employs another carrier to complete the voyage at a lower rate than that agreed to be paid by the shipper, so that the transhipment will be at a profit, it is presumed that such a contract was made by the carrier's agent in the carrier's own interest, and the shipper is still held liable for the freight which he contracted to pay. But the agent of the carrier is held to have no authority to contract to pay a greater sum than was agreed upon between the first carrier and the shipper, and if it is necessary in transhipping to contract to pay a higher rate, he is held in such act to be, not the agent of the carrier, but the agent from necessity of the owner of the goods.[46] The shipper can thus never gain by a transhipment. If the ship is captured by the public enemy, there is no right to freight,[47] but if, after capture, the goods are carried to destination, the carrier is entitled to full freight.[48] A carrier who carries the goods intrusted to him contrary to the express directions of the owner is entitled to no compensation. For instance, if goods marked to be forwarded by one line are sent by the preceding carrier over a different line, the latter cannot recover freight, as the marks show what the shipper's direction was.[49]

§ 212. When carrier's right to sue accrues.—The carrier has no right to sue for freight until his contract has been completed by an actual delivery, or constructive delivery, in the eyes of the law.[50] If, in addition to delivery, the contract provides that the carrier is to hold the goods a reasonable length of time for the consignee, or is to give notice to him, there is no right to

Johns. (N. Y.) 321; Crawford v. Williams, 1 Sneed (Tenn.) 205, 60 Am. Dec. 146 and note; Hugg v. Augusta Ins. & Banking Co., 7 How. (U. S.) 595, 12 L. ed. 834.

[46] Shipton v. Thornton, 9 Ad. & El. 314; The Soblomsten, L. R. 1 Adm. 293; Hugg v. Baltimore &c. Mining Co., 35 Md. 414, 6 Am. Rep. 425.

[47] Beale v. Thompson, 3 Bos. & P. 405; The Race Horse, 3 Rob. Adm. 101; Tirrell v. Gage, 4 Allen (Mass.) 245.

[48] Mumford v. Commercial Ins. Co., 5 Johns. (N. Y.) 262.

[49] Bird v. Georgia R. Co., 72 Ga. 655; Schureman v. Withers, Anthon's N. P. (N. Y.) 166 (2d ed. 230).

[50] Mashiter v. Buller, 1 Camp. 84; Grand Rapids & I. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. 385; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, Fed. Cas. No. 2559; Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177.

freight charges until such conditions have been met.[51] Freight paid in advance may be recovered by the shipper if the goods are not carried, since in such case there is a failure of consideration.[52] There may be an agreement, however, that freight paid in advance shall belong to the carrier even if the contract is not completed. If there is such an agreement, the shipper may not recover.[53]

§ 213. **Demurrage.**—The consignee of goods carried by water is liable to the carrier for any delay caused by his fault in not accepting the goods promptly after notice, and where there is stipulation in the contract as to the amount payable, the compensation for such delay is known as demurrage. In accordance with the universal rule in contracts, a stipulation which prescribes a time within which a thing is to be done, unqualifiedly, time being of the essence of the contract, absolutely binds the party making such agreement, although he may have been prevented from performing by circumstances entirely beyond his control. So if the charterer of a vessel binds himself without qualification to unload or load within a certain time, he takes the risk of anything which may occur to prevent his performance.[54] If the contract is, however, only to pay demurrage for detention by default of the charterers of the ship, they are not liable for detention caused, not by their act, but by some outside agency, as the firing upon the harbor by an enemy's war vessel, making unloading impossible.[55] All clauses providing that special demurrage shall be paid in certain cases must be strictly construed, and the carrier must show clear noncompliance in order to recover under such clause.[56]

[51] Hutchinson Carriers (3d ed.), § 829; Redmond v. Liverpool &c. Steamboat Co., 46 N. Y. 578.

[52] The Schooner Arthur B., 1 Alaska 403; De Sola v. Pomares, 119 Fed. 373; Benner v. Equitable Safety Ins. Co., 6 Allen (Mass.) 222; Griggs v. Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175; Brown v. Harris, 2 Gray (Mass.) 359; The Bird of Paradise, 5 Wall. (U. S.) 545, 18 L. ed. 662.

[53] De Silvale v. Kendall, 4 M. & S. 37; Hichs v. Shield, 7 El. & Bl. 633; Mashiter v. Buller, 1 Camp. 84.

[54] Hutchinson Carriers (3d ed.), § 833; Hagar v. Elmslie, 107 Fed. 511. 46 C. C. A. 446; Elmslie v. Hagar, 101 Fed. 840; Empire Transp. Co. v. Philadelphia &c. Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623.

[55] Burrill v. Crossman, 130 Fed. 763, 65 C. C. A. 189; Crossman v. Burrill, 179 U. S. 100, 45 L. ed. 106, 21 Sup. Ct. 38.

[56] Continental Coal Co. v. Bowne, 115 Fed. 945, 53 C. C. A. 427.

If delay is caused by the default of the shipowner, the charterer is liable under no circumstances,[57] or if the delay is caused by a stipulation in the contract which is for the shipowner's benefit, for instance that the ship shall be loaded only when it can be kept afloat, and the nature of the harbor is such that time is lost in waiting for tides.[58] In certain cases where delay is caused by the custom officers, the charterer is not liable.[59] And it is held that the carrier has no lien on the goods for demurrage unless there is a stipulation in the contract to that effect.[60]

§ 214. Construction of special clauses in demurrage contracts.—Ordinary forms of contracts may provide that loading or unloading shall be completed in so many "days", or "days excepting Sundays", "working days", or "weather working days". The first includes all days in succession, among them Sundays and holidays;[61] the second all days except Sundays;[62] the third excludes Sundays and legal holidays, but not stormy days, Good Friday, or a day taken off by the workmen to attend a funeral,[63] while the last excludes days when the weather is unfit for the work of loading.[64] Usually when the vessel begins to unload on one day, a day's time is counted at the end of that day, fractions of a day not being considered unless it is clear from the contract that such was the intention.[65] If there is an agreement for weather working days, the rule is that if substantial work is done, though not a full half day, a half day is counted; if almost

[57] Hansen v. Donaldson, 1 Sess. Cas. (4th) 1066; Ewan v. Tredegar Co., 88 Fed. 703; Jones v. Niver Coal Co., 135 Fed. 734, 68 C. C. A. 372.

[58] Carlton Steamship Co. v. Castle Mail Packets Co., Limited, L. R. (1898) App. Cas. 486, 67 L. J. Q. B. 795.

[59] Jones v. Niver Coal Co., 135 Fed. 734, 68 C. C. A. 372.

[60] Nicolette Lumber Co. v. People's Coal Co., 213 Pa. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327 and note, 110 Am. St. 550, 5 Am. & Eng. Ann. Cas. 387. But see post, § 217, n. 1. The Hyperion's Cargo, 2 Lowell (U. S.) 93. Contrary, see cases cited in note, 5 Am. & Eng. Ann. Cas. 387; Phillips v. Rodie, 15 East. 547, 13 R. R. 528; Birley v. Gladstone, 3 M. & S. 203.

[61] Hughes v. Hoskins Lumber Co., 136 Fed. 435; Baldwin v. Sullivan Timber Co., 65 Hun (N. Y.) 625, 48 N. Y. St. 296, 20 N. Y. S. 496, affd. 142 N. Y. 279, 36 N. E. 1060.

[62] James v. Brophy, 71 Fed. 310, 18 C. C. A. 49.

[63] Hughes v. Hoskins Lumber Co., 136 Fed. 435; Hagerman v. Norton, 105 Fed. 996, 46 C. C. A. 1; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650.

[64] The India, 49 Fed. 76, 1 C. C. A. 174; Hughes v. Hoskins Lumber Co., 136 Fed. 435.

[65] The Katy (1895), P. 56; Yeoman v. The King (1904), 2 K. B. 429, 73 L. J. K. B. 904.

a full day, a full day is counted, and no smaller fraction than a half day is counted, and if a very short time is worked, no account is taken at all.[66] Under an agreement to use "quick dispatch" in unloading, the charterer is practically bound to unload in a fixed time, and is not excused by showing that the customary method was slower.[67] If it is agreed to use customary "quick despatch", the construction depends upon the custom at the port,[68] and an agreement for "customary despatch" does not include voluntary delay by the charterers, but merely usages of the port beyond control of the charterer, and not any detention to meet the convenience of the charterer.[69] When it is provided that the cargo is to be unloaded "as fast as the steamer can deliver," no fixed time is contemplated, but the time in which unloading can be accomplished depends upon the circumstances, except such circumstances as are brought about by the one whose duty it is to unload.[70] Clauses providing that the ship is to be loaded "as fast as it can receive" are not dependent upon weather conditions.[71] An exception to demurrage liability if delay is caused by strikes does not refer to strikes at some distance from the port,[72] but, on the other hand, if there is a strike in being at the time the contract is signed, such strike is within the exception for the exception does not refer merely to future strikes.[73]

§ 215. **Demurrage where contract is silent as to time of unloading.**—If the contract is silent as to the time of loading or unloading, there is a contract implied that the charterer will unload or load with reasonable diligence under the circum-

[66] Branckelow Steamship Co. v. Lamport (1897), 1 Q. B. 570, 66 L. J. Q. B. 382.

[67] Mott v. Frost, 47 Fed. 82; Ten Thousand and Eighty-two Oak Ties, 87 Fed. 935.

[68] The Cargo of the Joseph W. Brooks, 122 Fed. 881.

[69] Seagar v. Steamship Co., 55 Fed. 324, 55 Fed. 880, 5 C. C. A. 290; Milburn v. Thirty-five Thousand Boxes, 57 Fed. 236, 6 C. C. A. 317; Egan v. Barclay Fibre Co., 61 Fed. 527; Smith v. Roberts, 67 Fed. 361, 14 C. C. A. 417.

[70] Hulthen v. Stewart, L. R. (1903) App. Cas. 389, 72 L. J. K. B. 917; Hine v. Perkins, 55 Fed. 996, 5 C. C. A. 377; The Glenfinlas, 48 Fed. 758, 1 C. C. A. 85.

[71] Atlantic &c. Steamship Co. v. Guggenheim, 123 Fed. 330.

[72] New Ruperra Steamship Co. v. Two Thousand Tons of Coal, 124 Fed. 937. Nor to a strike of coal operatives which makes necessary so much importation of coal as to crowd a harbor with coal vessels and delay unloading. W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 73 C. C. A. 502 and 5 L. R. A. (N. S.) 126n.

[73] Dobell v. Green (1900), 1 Q. B. 526, 69 L. J. Q. B. 434, 82 Law T. (N. S.) 314, 5 Com. Cas. 161.

stances.[74] No demurrage is allowable for delays such as both parties should have contemplated at the time the contract was made. A charterer must have a cargo ready for loading[75] in absence of contract or controlling usage. The charterer's duty is to provide appliances for loading or unloading such as are in ordinary use at the port for cargoes of the kind to be moved.[76] The words "in regular turn" in a charter party mean prima facie the regular turn of the port of lading, though it may be shown that they are used with a different meaning, as the regular turn at a colliery,[77] and the regular rule is that vessels shall load in order of arrival.[78] Lay days for loading are not counted as against the charterer until he is given notice of the readiness of the vessel,[79] and notice is necessary to the consignee at the port of discharge.[80] It is generally held that the ship must be in a position where the charterer can begin to do his work before lay days can be counted.[81] But if she is to go to a berth as ordered, the voyage is ended when she goes to a designated berth, and not when she arrives at the dock.[82] The charterer is not liable for delay after loading is completed when it occurs without his fault.[83] The consignee who accepts goods, though bound by an implied contract to pay freight, is not bound to pay demurrage unless there is an express contract,[84] but he may be liable for

[74] Pantland Hick v. Raymond L. R. (1893) App. Cas. 22, 62 L. J. Q. B. 98; Empire Transp. Co. v. Philadelphia & R. Coal &c. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623.

[75] Grant v. Coverdale, 9 App. Cas. 470; Kay v. Field, 8 Q. B. Div. 594, 10 Q. B. Div. 241.

[76] Wright v. New Zealand Shipping Co., 4 Ex. D. 165; Postlethwaite v. Freeland, 5 App. Cas. 599.

[77] Barque Quilpue, Limited, v. Brown (1904), 2 K. B. 264, 73 L. J. K. B. 596.

[78] McArthur Bros. Co. v. Six Hundred Twenty-two Thousand, Seven Hundred Fourteen Feet of Lumber, 131 Fed. 389.

[79] Dantzler Lumber Co. v. Churchill, 136 Fed. 560, 69 C. C. A. 270.

[80] Hutchinson Carriers (3d ed.), § 848; Smith v. Lee, 66 Fed. 344, 13 C. C. A. 506.

[81] Sanders v. Jenkins (1897), 1 Q. B. 93, 66 L. J. Q. B. 40, 1 Q. B. 93; Brereton v. Chapman, 7 Bing. 559. But if the charter party provides that "time to commence to run when steamer is ready to unload and written notice given, whether in berth or not," time begins as soon as notice is given, whether or not the berth is ready. W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126n.

[82] In re Two Thousand Ninety-eight Tons of Coal, 135 Fed. 317, 67 C. C. A. 671; Tharsis Sulphur & Copper Co. v. Morel (1891), 2 Q. B. 647, 61 L. J. Q. B. 11; Sanders v. Jenkins, 1 Q. B. 93, 66 L. J. Q. B. 40.

[83] Pringle v. Mollett, 6 M. & W. 80.

[84] Dayton v. Parke, 142 N. Y. 391, 37 N. E. 642; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. 630n.

damages in the nature of demurrage for undue delay caused by his act.[85]

§ 216. Cesser clause and lien for demurrage.—The clause often found in charter parties known as the cesser clause, to the effect that the charterer's responsibility is to cease when the vessel is loaded and bills of lading signed, is construed, together with a clause providing a lien in favor of the shipowners, for demurrage, and the cesser clause is held inapplicable to a liability not included by the lien.[86] The carrier has no lien at common law for demurrage, and such right must arise by contract.[87] The maritime law allows to the shipowner a lien for demurrage, or for damages in the nature thereof,[88] but either lien may be waived, what is a waiver being a question of fact. Delivery of the goods and collection of freight is not a waiver of a claim for demurrage,[89] but other circumstances must be shown.

§ 217. Demurrage as applied to railroads.—It is held that where the railroad company is under a duty to unload, as in the case of small or package freight, it can assert no claim against the consignee for demurrage charges, the reason being that railroad companies discharge cargoes, while in the case of water carriers the consignee must discharge.[90] If, however, by contract or custom it is the duty of the consignee to unload, as where the freight is bulky, the company may sue for a reasonable compensation for the use of the cars, if not unloaded in a reasonable time, for if the railroad company is deprived of the use of its cars, both the company and the public will be injured.[91] And railroads may pro-

[85] Graham v. Planters' Compress Co., 129 Fed. 253.

[86] Crossman v. Burrill, 179 U. S. 100, 45 L. ed. 106, 21 Sup. Ct. 38.

[87] See cases cited under note 60 this chapter.

[88] Two Hundred Seventy-five Tons of Mineral Phosphates, 9 Fed. 209; The Hyperion's Cargo, 2 Lowell (U. S.) 93; Donaldson v. McDowell, 1 Holmes (U. S.) 290, Fed. Cas. No. 3985.

[89] Iroquois Furnace Co. v. Elphicke, 200 Ill. 411, 65 N. E. 784; Durchmann v. Dunn, 106 Fed. 950, 46 C. C. A. 62; Garfield &c. Coal Co. v. Fitchburg R. Co., 116 Mass. 119, 44 N. E. 119. See Two Hundred Sixteen Loads and Six Hundred Seventy-eight Barrels of Fertilizer, 88 Fed. 984.

[90] Chicago & N. W. R. Co. v. Jenkins, 103 Ill. 588.

[91] Elliott R. R. (2d ed.), § 1567; Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. 32, 4 Am. & Eng. Ann. Cas. 12; Miller v. Georgia R. &c. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170, 50 Am. & Eng. R. Cas. 79; Schumacher v. Chicago & N. W. R. Co., 207 Ill.

vide in their receipts that unless the cars are unloaded by a certain time, demurrage will be charged, and acceptance of such a receipt will bind the shipper to pay a reasonable demurrage charge.[92] Or if such charges are provided for by the reasonable rules and regulations of the railroad company the shipper is liable without notice in the receipt.[93] So rules to the same effect of car service associations will be enforced.[94] The better rule seems to be that the railroad has a lien on the goods for such demurrage charges,[95] but, on the contrary, it is held in a recent case that it has not such a lien unless expressly contracted for and may not retain freight until charges for demurrage are paid.[96]

§ 218. Charges for special services.—A carrier may not charge specially for anything customarily rendered as part of, or properly incident to, the carriage, as for proper station accommodations, or loading, unloading, or weighing goods.[97] But car-

199, 69 N. E. 825; Norfolk &c. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. 916 and note. Charges of one dollar a day for detention of a car after 48 hours, Sundays and holidays excepted, have been held not unreasonable. Kentucky Wagon Mfg. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. 726, 36 L. R. A. 850, 56 Am. St. 326; Miller v Georgia R. &c. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170, 50 Am. & Eng. R. Cas. 79. And such a charge is held not to be in violation of a statute forbidding any except the regular charge for transportation, delivery or storage, it being a charge neither for transportation, delivery, nor storage. Norfolk &c. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. 916 and note. It is a defense in an action for demurrage that cars were so delivered as to prevent defendant from handling them properly, being delivered in such large numbers and so unreasonably concentrated. Louisville &c. R. Co. v. Empire State Chem. Co., 189 Fed. 174.

[92] Yazoo &c. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715; Pennsylvania R. Co. v. Midvale Steel Co., 201 Pa. St. 624, 51 Atl. 313, 88 Am. St. 836.

[93] Miller v. Georgia R. &c. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170, 50 Am. & Eng. R. Cas. 79; Yazoo &c. R. Co. v. Searles, 85 Miss. 520, 37 S. W. 939, 68 L. R. A. 715.

[94] Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 137 So. 667, 68 L. R. A. 227, 110 Am. St. 32; Kentucky Wagon Mfg. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. 726, 36 L. R. A. 850, 56 Am. St. 326, 12 Lewis Am. R. & Corp. 48; Yazoo &c. R. Co. v. Searles, 85 Miss. 520, 37 S. W. 939, 68 L. R. A. 715.

[95] Hutchinson Carriers (3d ed.), § 862; Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. 32; Schumacher v. Chicago & N. W. R. Co., 207 Ill. 199, 69 N. E. 825; Kentucky Wagon Mfg. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. 326; Pittsburg, C. C. & St. L. R. Co. v. Mooar Lumber Co., 27 Ohio Cir. Ct. 588.

[96] Nicolette Lumber Co. v. People's Coal Co., 213 Pa. St. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327n, 110 Am. St. 550, 5 Am. & Eng. Ann. Cas. 387.

[97] Elliott R. R. (2d ed.), § 1566; Hall v. London &c. R. Co., L. R. 15 Q. B. Div. 505, 22 Am. & Eng. R. Cas. 446; Yazoo &c. R. Co. v.

riers may charge for services not a part of transportation or not usually rendered in carrying, as for terminal services after transportation is completed,[98] or for services in conveying the property from its place of delivery to an elevator or warehouse,[99] or furnishing food to stock, where such was the owner's duty and he fails,[1] and, it has been held, for special service in carrying perishable goods in specially fitted cars by fast freight.[2]

§ 219. **Discrimination in freight charges.**—The subject of discrimination of rates was well disposed of in the case of State v. Central Vermont Railway Company,[3] by Tyler, J., who said, "At common law a common carrier of freight was not bound to treat all shippers alike. It was only bound to carry for every shipper at a reasonable rate. It might favor any particular shipper or class of shippers where the circumstances of the case warranted a distinction, as where the preferred shipper or class offered goods in larger quantities or under such conditions that they could be transported at less expense. But there is always the limitation that the discrimination or preferences must be reasonable, and the terms must not be unreasonably unequal. It is equally well settled that it is within the power of a state legislature, with reference to commerce within the state, and of congress, with reference to interstate commerce, to prescribe the rates to be charged by public carriers for their services, so long as the charges fixed do not require that the services rendered shall be without reasonable compensation.[4] But it is held that, though the power of the legislature to prescribe the charges of a railroad company is beyond question, it is not an unlimited power. It is not a power to destroy or to compel the doing of a service without

Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715.

[98] Elliott R. R. (2d ed.), § 1551, 1566; National Tube Works Co. v. Baltimore &c. R. Co. (Pa.), 8 Atl. 6, 28 Am. & Eng. R. Cas. 13; Interstate Commerce Com. v. Chicago, B. & I. R. Co., 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. 824.

[99] Owen v. St. Louis & S. F. R. Co., 83 Mo. 454, 25 Am. & Eng. R. Cas. 371; Johnson v. Cayuga & S. R. Co., 11 Barb. (N. Y.) 621.

[1] Story Bailments (9th ed.) 586; Great Northern R. Co. v. Swaffield, L. J. 43 Exch. 89, L. R. 9 Exch. 132.

[2] Delaware State Grange &c. of the Patrons of Husbandry v. New York, P. & N. R. Co., 3 I. C. R. 554. Some of these matters, as well as demurrage, may be largely regulated by interstate commerce law or state railroad commission act.

[3] State v. Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. 1065.

[4] Citing Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418.

reward, or to take private property for public use without just compensation or without due process of law."[5] So rebates of a part of freight charges, after carriage, have been allowed at common law, where the discrimination was not unjust, and the shipper may recover in a proper action.[6] But if such a rebate amounted to unjust discrimination it was not allowable at common law.[7] The shipper cannot recover on a contract to pay rebate which is illegal.[8] So if the carrier makes a mistake and charges a lower rate on an interstate shipment than that allowed by the Interstate Commerce Act, he may demand the proper amount before delivery.[9] This does not hold if he intentionally gave a lower rate,[10] but whether given by mistake or intention, the shipper cannot hold a common carrier who was not a party to the contract and had no knowledge.[11] It is beyond the scope of the present article to enter into a particular discussion of the manner in which contracts which carriers may enter into are affected under the Interstate Commerce Act and Hepburn Amendment,[12] or by state statutes,[13] and we simply refer generally to authorities where the same are discussed.

§ 220. Carrier's special property in goods, and general rights as bailee.—Since the carrier is a bailee for hire, and

[5] Citing Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. 468; cases cited in Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418; Georgia, R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47. See also, Cleveland, C. C. & I. R. Co. v. Closser, 126 Ind. 348, 9 L. R. A. 754n, 22 Am. St. 593; Louisville &c. R. Co. v. Commonwealth, 99 Ky. 132, 18 Ky. L. 42, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. 457.

[6] Elliott R. R. (2d ed.), § 1565; Cleveland, C. C. & I. R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754n, 22 Am. St. 593; Laurel Cotton Mills v. Gulf, S. I. R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

[7] Cook v Chicago, R. I. & P. R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. 512.

[8] Indianapolis, D. & S. R. Co. v. Ervin, 118 Ill. 250, 8 N. E. 862, 59 Am. Rep. 369; Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70. As to effect of interstate commerce law on existing contracts for rebates, see Bullard v. Northern Pac. R. Co., 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246.

[9] Savannah &c. R. Co. v. Bundick, 94 Ga. 775, 21 S. E. 995; Haurigan v. Chicago &c. R. Co., 80 Nebr. 132, 113 N. W. 983, 16 Am. & Eng. Ann. Cas. 450 and note.

[10] Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. 108.

[11] Chicago, R. I. & P. R. Co. v. Hubbell, 54 Kans. 232, 38 Pac. 266.

[12] Elliott R. R. (2d ed.), §§ 1662b-1688c. See Barnes Interstate Transportation.

[13] Elliott R. R. (2d ed.), §§ 1467-1469.

under a responsibility to the owner as against third persons, he stands in general in the place of the owner to redress all wrongs or injuries to the goods while in his possession, and if the goods are taken from his possession wrongfully, he may recover by an appropriate action, in his own name, or if they are damaged or injured he may sue for damages in his own name.[14] The owner would have a right of action for the same wrong, but this is not inconsistent with the right of the carrier.[15] If the carrier should recover the full value, he is a trustee for the owner for the amount beyond his own interest.[16]

§ 221. **When subrogated to owner's rights.**—When, however, the goods have been lost or destroyed while in the possession of the carrier through the fault of another, and the carrier has paid the owner the value of the goods, which has been taken in full satisfaction, the carrier is subrogated to the full rights of the owner against such third party, and this holds true even if the goods have been injured or lost by the act of the carrier's agent, since in such case the carrier succeeds to the owner's rights against the agent.[17] The carrier may even recover the possession of the goods from the owner himself if they have been taken from him unlawfully, as, for instance, before freight charges have been paid, in which instance the carrier, having a lien upon the goods, may recover them or may sue for damages to his special interest. In such respect he is said to be in the situation of a pawnee, from whom the bailor takes the goods without payment of the debt.[18]

§ 222. **Right to insure.**—The carrier may insure the goods to the full extent of their value, not only to the extent of

[14] Hutchinson Carriers (3d ed.), § 779; Pittsburg, C. C. & St. L. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. 316; The Beaconsfield, 158 U. S. 303, 39 L. ed. 993, 15 Sup. Ct. 860.

[15] Booth v. Terrell, 16 Ga. 20; Pittsburg, C. C. & St. L. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. 316; Morgan v. Ide, 8 Cush. (Mass.) 420.

[16] Steamboat Farmer v. McCraw, 26 Ala. 189, 62 Am. Dec. 723; Chesley v. St. Clair, 1 N. H. 189; Bishell v. Huntington, 2 N. H. 142; Woodman v. Nottingham, 49 N. H. 387, 6 Am. Rep. 533.

[17] Hagerstown Bank v. Adams Exp. Co., 45 Pa. St. 419, 84 Am. Dec. 499.

[18] Story Bailments (9th ed.), § 303; White v. Webb, 15 Conn. 302; Van Baalen v. Dean, 27 Mich. 104; Young v. Kimball, 23 Pa. St. 193; Hickok v. Buck, 22 Vt. 149.

his own interest, for the carrier in case of loss may be liable for the whole value,[19] or he may insure in case he is excepted from the risk, for the benefit of the owners.[20] If he insures for the full amount, he is, as to the amount above his interest, a trustee for the owner.[21] He may contract with the shipper for the benefit of insurance, made by the shipper, upon the goods, and in case of loss and liability upon the insurer's part, he may pay the owner, and recover from the insurer.[22] But the carrier cannot refuse to carry goods unless the owner insure for the carrier's benefit.[23]

§ 223. **Authority to sell.**—Like any other bailee, the carrier, by virtue of his relation, has no authority to sell the goods, and a sale by him, without other authority, will not convey title,[24] even to a good faith purchaser. Nor can he sell them to satisfy his lien, but must have them sold by legal proceedings.[25] Under a sudden emergency, or in the case of absolute necessity, the carrier may have authority to sell as the agent of the owner, but not as carrier,[26] as for instance in the case of perishable goods, which, if not sold, would perish before other disposition could be made of them.[27] It is held that in every contract to carry for freight there is an implied obligation on the part of the shipowner that in the event of any disaster happening to the ship or cargo in a port where correspondence cannot be had with the freighter, the

[19] Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. 750, 1176; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68.

[20] Hutchinson Carriers (3d ed.), § 783.

[21] Pennefeather v. Baltimore Steam-Packet Co., 58 Fed. 481; Home Ins. Co. v. Minneapolis, St. P. & S. R. Co., 71 Minn. 296, 74 N. W. 140; Stilwell v. Staples, 19 N. Y. 401.

[22] Mercantile Mutual Ins. Co. v. Calebs, 20 N. Y. 173; Missouri Pac. R. Co. v. International Marine Ins. Co., 84 Tex. 149, 19 S. W. 459; Merchants' Cotton Press Storage Co. v. Ins. Co. of North America, 151 U. S. 368, 38 L. ed. 195, 14 Sup. Ct. 367.

[23] The Seaboard, 119 Fed. 375; Willock v. Pennsylvania Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. 674, 11 Lewis Am. R. & Corp. 642; Inman v. S. Car. R. Co., 129 U. S. 128, 32 L. ed. 612, 9 Sup. Ct. 249.

[24] Lickbarrow v. Mason, 6 East 21; White v. Webb, 15 Conn. 302; Doane v. Russell, 3 Gray (Mass.) 382; Agnew v. Johnson, 22 Pa. St. 471, 62 Am. Dec. 303; Miller Piano Co. v. Parker, 155 Pa. St. 208, 26 Atl. 303, 35 Am. St. 873.

[25] Indianapolis & St. Louis R. Co. v. Herndon, 81 Ill. 143; Hunt v. Haskell, 24 Maine 339, 41 Am. Dec. 387; Briggs v. Boston & Lowell R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Rankin v. Memphis & Cincinnati Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339.

[26] Mechem Agency, § 481.

[27] Rankin v. Memphis & Cincinnati Packet Co., 9 Heisk. (Tenn.) 564, 24

master shall act as his agent, and use his best efforts for the protection and preservation of the cargo.[28] The purchaser at such a sale must show clear authority on the part of the carrier to sell, that is, that the sale was necessary, because the property was so perishable that it was impossible to preserve it for the owner, or that it was impossible to carry it farther or to store it; that the carrier had acted in good faith and with sound discretion; and that it was impossible to communicate with the owner, and receive his instructions, without a delay which the condition of the property and the circumstances would not permit.[29] If the sale was not necessary and justifiable, the carrier is liable for conversion.[30] It is said that the degree of necessity which justifies such a sale is "supreme", "urgent", or "absolute",[31] and it must appear besides the other elements named that the sale must be made where there is a market and competition in buying, so that where those who saved a crew and cargo about to become derelict in a distant ocean made a bargain with the master by which they bought the goods for a nominal figure, it was held that they were entitled only to salvage money and freight, and that their title was bad.[32] So a master of a vessel may throw overboard, or sacrifice goods, but he cannot give them away.[33]

§ 224. **Right to know character of goods offered for carriage.**—It is the general rule that the carrier has no right to demand, as a prerequisite to their carriage, to know the character of goods which are offered, if the goods or packages are of the kind which he usually carries,[34] but he may inquire the value, in order to fix his charge and to know the amount of responsibility

Am. Rep. 339; Arthur v. Schooner Cassius, 2 Story (U. S.) 81; Dudley v. Chicago, M. & St. P. R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. 1027. Statute may give this right where consignee refuses to receive. Chesapeake & O. R. Co. v. Saulsberry, 126 Ky. 179, 103 S. W. 254, 12 L. R. A. (N. S.) 431n.

[28] Notara v. Henderson, L. R. 5 Q. B. 346.

[29] Hutchinson Carriers (3d ed.), § 790; Butler v. Murray, 30 N. Y. 88; New England Ins. Co. v. Brig Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213.

[30] Cannan v. Meaburn, 1 Bing. 243; Myers v. Baymore, 10 Pa. St. 114, 49 Am. Dec. 586.

[31] Hutchinson Carriers (3d ed.), § 792.

[32] Post v. Jones, 19 How. (U. S.) 150, 15 L. ed. 618.

[33] The Albany, 44 Fed. 431.

[34] Crouch v. The London & Northwestern R. Co., 7 Exch. 705; The Nitro-Glycerin Case, 15 Wall. (U. S.) 524, 21 L. ed. 206.

assumed.[35] Still, if one offers for shipment goods which are or might become dangerous to the person or property of other persons carried, it is his duty to make such character known, for the carrier is not bound to carry such goods unless he holds himself out as carrying them.[36] This rule applies where the carrier believes goods are contraband.[37] Only when, upon good grounds, the carrier believes that a package contains dangerous goods, is he authorized to demand before carrying that the contents be made known.[38] If the goods of other shippers are damaged by dangerous goods, the carrier is liable to them, and at the same time has his remedy against the shipper,[39] and even if the latter did not know the dangerous character, he is conclusively presumed so to have known, and it has been said that in every shipment there is an implied contract by the shipper that his goods are not of a kind to injure those of others.[40]

§ 225. **Shipper's failure to deliver.**—If a party contracts to deliver goods to a carrier for transportation and fails to deliver, it is held that the carrier has an action for the damages sustained, but would be bound to use diligence to obtain other goods to carry.[41]

§ 226. **The carrier's lien.**—The carrier's lien is a right to keep possession of the goods until charges for freight and advances made have been paid, and is practically similar to the lien of any other bailee who has performed labor on goods or spent money on them at the owner's request. The owner has no right to possession of the goods until he has paid these charges, or tendered payment, and, generally speaking, the carrier has no right to the payment of them until the goods are tendered to the consignee.[42] The carrier's lien is specific, confined to the charges

[35] Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473; Sheldon v. Robinson, 7 N. H. 157, 26 Am. Dec. 726; Baldwin v. Liverpool & Great Western Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; Brown v. The Camden & Atlantic R. Co., 83 Pa. St. 316.

[36] The Nitro-Glycerin Case, 15 Wall. (U. S.) 524, 21 L. ed. 206.

[37] Adams Exp. Co. v. Commonwealth, 33 Ky. L. 967, 112 S. W. 577, 18 L. R. A. (N. S.) 1182.

[38] The Nitro-Glycerin Case, 15 Wall. (U. S.) 524, 21 L. ed. 206.

[39] Brass v. Maitland, 6 El. & Bl. 470.

[40] Pierce v. Winsor, 2 Sprague Dec. (U. S.) 35.

[41] Hunter v. Fry, 2 B. & Ald. 421; Cockburn v. Alexander, 6 C. B. 790; Harries v. Edmonds, 1 C. & K. 686; Bixby v. Bennett, 3 Daly (N. Y.) 225.

[42] Clarkson v. Edes, 4 Cow. (N. Y.) 470; Barker v. Havens, 17 Johns. (N. Y.) 234, 8 Am. Dec. 393;

and advances upon the particular goods upon which it is claimed,[43] and he has no claim upon any goods for other amounts which may be owed him by the shipper.[44]

Such special lien is favored by the courts, as opposed to general liens, which are not favored, and the presumption is that the carrier's lien continues to exist until it is shown clearly that it has been waived or lost.[45] The lien extends only to charges for or incident to transportation,[46] which includes legal import duties,[47] and salvage charges,[48] but not warehouse charges.[49] It also includes advances made to preceding carriers for the part of the transportation performed by them, and the last carrier may refuse to deliver the goods unless such advances are paid,[50] or unless he is shown or knows that the preceding carriers were prepaid.[51] So, if the first carrier employs a second to complete the contract, the second is entitled to a lien,[52] unless the first has been paid for the service[53] or had no authority to forward beyond his own line.[54] But as against the owner who is not in fault, the

Bowman v. Hilton, 11 Ohio 303; Ewart v Kerr, Rice L. (S. Car.) 203; Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350; Warehouse & Builders Supply Co. v. Galvin, 96 Wis. 523, 71 N. W. 804, 65 Am. St. 57.

[43] Pharr v. Collins, 35 La. Ann. 939. 48 Am. Rep. 251; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671, 12 Am. St. 885; Bacharach v. Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409.

[44] Rushforth v. Hadfield, 6 East 519; McFarland v. Wheeler, 26 Wend. (N. Y.) 467; Bacharach v. Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409; note in 42 Am. & Eng. R. Cas. 364.

[45] Hutchinson Carriers (3d ed.), § 865.

[46] Payne v. Ralli, 74 Fed. 563; Illinois Cent. R. Co. v. Alexander, 20 Ill. 23; Miller v. Mansfield, 112 Mass. 260; The Virginia v. Kraft, 25 Mo. 76; Berry Coal &c. Co. v. Chicago, P. & St. L. R. Co., 116 Mo. App. 214, 92 S. W. 714.

[47] Guesnard v. Louisville & N. R. Co., 76 Ala. 453, 23 Am. & Eng. R. Cas. 691; Wabash R. Co. v. Pearce, 192 U. S. 179, 48 L. ed. 397.

[48] Chicago & S. W. R. R. Co. v. Northwestern Union Packet Co., 38 Iowa 377.

[49] Winchester v. Busby, 16 Can. Sup. Ct. 336; Lambert v. Robinson, 1 Esp. 119; Steamboat Virginia v. Kraft, 25 Mo. 76.

[50] Elliott R. R. (2d ed.), §§ 1569-70; Bissel v. Price, 16 Ill. 408; Caye v. Pool's Assignee, 108 Ky. 124, 55 S. W. 887, 49 L. R. A. 251, 94 Am. St. 348; Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228.

[51] Converse Bridge Co. v. Collins, 119 Ala. 534, 24 So. 561; American Nat. Bank v. Georgia R. Co., 96 Ga. 665, 23 S. E. 898, 51 Am. St. 155; Travis v. Thompson, 37 Barb. (N. Y.) 236; Marsh v. Union Pac. R. Co., 3 McCrary (U. S.) 236.

[52] Nordemeyer v. Loescher, 1 Hilt. (N. Y.) 499.

[53] Matthews v. Gibbs, 3 El. & El. 282.

[54] Denver &c. R. Co. v. Hill, 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376; Crossan v. New York & N. E. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. 408, 40 Am. & Eng. R. Cas. 136 and note; Liefert v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. 899.

carrier has no right to a lien upon goods carried for one wrongfully in possession, who had no authority to ship them.[55] But, if, by fault of the shipper or his agent, the goods are taken to a wrong destination, or over a wrong route, the carrier has a lien for freight.[56]

The lien is lost by surrendering the goods unconditionally,[57] and this rule applies if goods are surrendered to consignee as agent of consignor, on consignee's promise to return goods until the charges are paid,[58] or if a delivery is made to consignee as agent of carrier, then the carrier's lien is lost when the consignor pays the consignee.[59] There may be a conditional delivery with an understanding that the carrier reserve the lien,[60] but if the carrier merely intended to hold a lien, and did not apprise the consignee of such fact,[61] or if he refuses to deliver on other grounds[62] without claiming a lien, he has waived the lien. A delivery of goods to assignee for benefit of creditors of the consignee is not a waiver of the lien, for the assignee is considered to hold the goods for the carrier, as well as the other creditors.[63] If the carrier delivers a part of the goods, he still has a lien for the entire freight upon the portion remaining.[64] Or where the

[55] Savannah, Florida & Western R. Co. v. Talbot, 123 Ga. 378, 51 S. E. 401, 3 Am. & Eng. Ann. Cas. 1092; Robinson v. Baker, 59 Mass. 137, 51 Am. Dec. 54; Pingree v. Detroit &c. R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. 479; Kohn v. Richmond &c. R. Co., 37 S. Car. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. 726.

[56] Fordyce v. Johnson, 56 Ark. 430, 19 S. W. 1050; Crossan v. New York & N. E. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. 408.

[57] Gregg v. Illinois Central R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Reineman v. Covington &c. R. Co., 51 Iowa 338, 1 N. W. 619; Sears v. Wills, 4 Allen (Mass.) 212; Bigelow v. Heaton, 4 Denio (N. Y.) 496.

[58] Lembeck v. Jarvis Terminal Cold S. Co., 69 N. J. Eq. 781, 63 Atl. 257, 7 Am. & Eng. Ann. Cas. 960 and note.

[59] Lembeck v. Jarvis Terminal Cold S. Co., 69 N. J. Eq. 781, 63 Atl. 257, 7 Am. & Eng. Ann. Cas. 960 and note.

[60] Costello v. Seven Hundred Thirty-four Thousand Seven Hundred Laths, 44 Fed. 105; McBrier v. Cargo of Hard Coal, 69 Fed. 469; The Eddy, 5 Wall. (U. S.) 481, 18 L. ed. 486; Bags of Linseed, 1 Black. (U. S.) 108.

[61] The Tan Bark Case, 1 Brown Adm. (U. S.) 151, Fed. Cas. No. 13742.

[62] Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. 315, 40 Am. & Eng. R. Cas. 151; Leigh v. Mobile &c. R. Co., 58 Ala. 165.

[63] Caye v. Pool's Assignee, 108 Ky. 124, 55 S. W. 887, 49 L. R. A. 251, 94 Am. St. 348.

[64] New Haven & Northampton Co. v. Campbell, 128 Mass. 104, 35 Am. Rep. 360; Lane v. Old Colony R. Co., 14 Gray (Mass.) 143; Fuller v. Bradley, 25 Pa. St. 120. See Jeffries v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919.

delivery is obtained by trick or fraud, or a promise to pay as soon as the delivery is made, the lien is not lost.[65]

The carrier's lien is prior to the claims of general creditors[66] or to the right of the vendor of goods to stoppage in transitu.[67] If through any cause for which the carrier is liable, the goods are injured and the damage is equal to or greater than the freight charges, the lien is destroyed.[68] The lien may be waived by an agreement for payment of freight at a time later than the date of delivery, or where, from the contract, the payment is necessarily to be made after delivery.[69] But where the terms of the special contract are not such that payment before delivery of the goods is clearly inconsistent with its terms, the carrier has not waived his lien, for there is a presumption in favor of its existence, which is only overcome by clear evidence.[70] If the goods have been carried to the destination, and the owner or the consignee refuses to pay the freight, and accept them within the contract time, or in the absence of stipulation, within a reasonable time, the carrier may store the goods in a warehouse at the expense of the consignee, subject to his lien for freight, the possession of the warehouseman being that of the carrier.[71] Property of the United States government is subject to lien, as that of a private person.[72] It seems that a tender of the charges demanded by the carrier discharges the lien.[73] The carrier's lien

[65] Wallace v. Woodgate, Ry. & M. 193; Hays v. Riddle, 1 Sandf. (N. Y.) 248; Bigelow v. Heaton (N. Y.), 4 Denio (N. Y.) 496, 6 Hill (N. Y.) 43; One Hundred Fifty-one Tons of Coal, 4 Blatch. (U. S.) 368.

[66] Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84; Cooley v. Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. 609; Santa Fe Pac. R. Co. v. Bossut, 10 N. Mex. 322, 62 Pac. 977.

[67] 2 Kent's Com. 541; Morley v. Hay, 3 M. & R. 696; Oppenheim v. Russell, 3 Bos. & P. 42; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 12 Am. St. 885.

[68] Missouri Pac. R. Co. v. Peru-Van Zandt Co., 73 Kans. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. 468, 9 Am. & Eng. Ann. Cas. 790; Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

[69] Pinney v. Wells, 10 Conn. 104; Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Raymond v. Tyson, 17 How. (U. S.) 53, 15 L. ed. 47; The Eddy, 5 Wall. (U. S.) 481, 18 L. ed. 486.

[70] Howard v. MaCondray, 7 Gray (Mass.) 516; The Bird of Paradise, 5 Wall. (U. S.) 545; The Schooner Volunteer, 1 Sumn. (U. S.) 551.

[71] Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Alden v. Carver, 13 Iowa 253, 81 Am. Dec. 430; Western Transp. Co. v. Barber, 56 N. Y. 544; The Eddy, 5 Wall. (U. S.) 481, 18 L. ed. 486.

[72] Union Pac. R. Co. v. United States, 2 Wyo. 170.

[73] Hutchinson Carriers (3d ed.), § 887, citing Martindale v. Smith, 1 Q. B. 389 and Moynahan v. Moore, 9 Mich. 9, 77 Am. Dec. 468n.

is not assignable, is a personal right, and does not pass by sale, or pledge or any other tortious transfer of the goods by the carrier.[74] He cannot sell the goods for the lien, but if the lien is not paid, the goods must be sold by judicial process.[75] This is the general rule, but there are statutes in some states authorizing a sale to satisfy the lien by proceeding in a certain way without resorting to the courts.[76] Although the lien is waived, the carrier may still sue at law to recover its charges.[77]

[74] Hutchinson Carriers (3rd ed.), § 888 and cases cited.

[75] See cases cited in last note. Myers v. Baymore, 10 Pa. St. 114, 49 Am. Dec. 586; Liefert v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. 899.

[76] See 4 Elliott R. R. (2d ed.), § 1571.

[77] Galt v. Archer, 7 Grat. (Va.) 307. See also, Elliott R. R. (2d ed.), § 1559; cases cited in first note 18, this chapter.

CHAPTER XIV.

TERMINATION OF THE RELATION OF CARRIER.

§ 227. Termination of the relation of carrier.
228. Delivery to right person.
229. Place of delivery.
230. Where goods are shipped to a certain place.
231. Delivery as warehouseman.
232. Delivery by water carriers.
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234. Massachusetts rule.
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240. Delivery by express companies.
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242. Carrying goods C. O. D.
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244. Excuses for nondelivery—Seizure under legal process.
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247. Delivery to connecting carrier and liability of connecting carrier—In general.
248. Who is a connecting carrier.
249. Contract for through carriage.
250. Authority to make through contract.
251. Which carrier is liable to consignee.
252. Compensation of connecting carriers.
253. Delivery to connecting carriers.

§ 227. Termination of the relation of carrier.—The termination of the relation of carrier is naturally by delivery to the consignee or to a connecting carrier. It may be brought about by the delay of the consignee in receiving the goods, under which circumstances the relationship of warehouseman may arise, or by the owner's directing delivery back to him before the carriage contract is completed. Proper delivery is an element imposed by law as a part of the obligation entered into by every carrier, when he makes a contract of carriage, and his extraordinary liability is terminated only by delivery, with certain exceptions.[1]

[1] Hutchinson Carriers (3d ed.), § 662; Elliott R. R. (2d ed.), § 1517; Cavallaro v. Texas R. Co., 110 Cal. 248, 42 Pac. 918, 52 Am. St. 94; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Smith v. Nashua &c. R. Co., 27 N. H. 86, 59 Am. Dec. 364. For general collection

The general rule is that a delivery must be made to the right person, at a reasonable time, and proper place, in a proper manner.[2]

§ 228. Delivery to right person.—The former rule of law was that all common carriers except ships trading with foreign countries must deliver personally to the consignee,[3] but even then the carrier might show an established usage to the contrary.[4] Now, in case of vessels and railroads, there is an established custom to deliver at fixed depots or places,[5] though even now a railroad carrier may be required to make personal delivery or delivery at a designated place not a regular station, by custom or express contract.[6] When it is the duty of a carrier to make a personal delivery, it is his duty to seek the consignee, and make a tender of the goods, and, if he cannot at once find him, or if he is not at the address marked on the goods, he must use reasonable diligence to find him.[7] There is said to be absolutely no excuse for the carrier's delivery to the wrong person, and he is under the duty of being absolutely certain as to the person. No circumstances of fraud, imposition, or mistake will excuse him.[8] If he has any doubt as to a person who applies for the goods, he should require positive proof of his identity, and has the right to refuse delivery until the applicant has established his identity, if he has reasonable grounds to doubt his right to the goods.[9]

of authorities on subject of this chapter, see notes, 21 Am. & Eng. Ann. Cas. 531 and 97 Am. St. 84.

[2] Hutchinson Carriers (3d ed.), § 664; Bartlett v. The Philadelphia, 32 Mo. 256; Hill v. Humphreys, 5 Watts & S. (Pa.) 123, 39 Am. Dec. 117. See Brunson v. Atl. Coast Line Co., 76 S. Car. 9, 56 S. E. 538, 9 L. R. A. (N. S.) 577.

[3] Elliott R. R. (2d ed.), § 1518; Gibson v. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

[4] Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507; Farmers' & Merchants' Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

[5] Elliott R. R. (2d ed.), § 1518; South and North Ala. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419.

[6] Elliott R. R. (2d ed.), § 1518; Vincent v. Chicago & A. R. Co., 49 Ill. 33; Baltimore &c. R. Co. v. Green, 25 Md. 72; State v. Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

[7] Schroeder v. Hudson River R. Co., 5 Duer. (N. Y.) 55; Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402.

[8] Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. 45, 5 Am. & Eng. Ann. Cas. 97, and note citing authorities generally; Mobile &c. R. Co. v. Bay Shore Lumber Co., 165 Ala. 610, 51 So. 956, 138 Am. St. 84; Pacific Exp. Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. 324.

[9] Hutchinson Carriers (3d ed.), § 668; Sellers v. Savannah &c. R. Co., 123 Ga. 386, 51 S. E. 398.

Delivery to the wrong person is a conversion even though made by innocent mistake or through fraud practised on the carrier.[10] So delivery upon a forged order or the like is a conversion,[11] and it has been held that delivery to one who orders in a fictitious name or assumes the name of another is a misdelivery.[12] Other cases, in which the shipper has been misled by the one who ordered the goods, but in which they were actually delivered to the one who ordered them, and the mistake was held to be a confusion of persons upon the shipper's part, and not a mistake of the carrier, hold the carrier not liable.[13] Yet other courts have taken an opposite view in almost the same state of facts, where there were two men of the same name, or claiming to be of the

[10] St. Louis & I. M. R. Co. v. Larned, 103 Ill. 293; McCulloch v. McDonald, 91 Ind. 240; Forbes v. Boston &c. R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76 and note; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Powell v. Meyers, 26 Wend. (N. Y.) 591. If the carrier disobeys the shipper's directions as to delivery, he is liable for conversion, though when the goods are restored to him he offers to return them to the shipper. Marshall & Mitchell Grain Co. v. Kansas City &c. R. Co., 176 Mo. 480, 75 S. W. 638, 98 Am. St. 508.

[11] Gosling v. Higgins, 1 Campb. 451, 10 R. R. 726; Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Guillaume v. Hamburg American Packet Co., 42 N. Y. 212, 1 Am. Rep. 512; Houston &c. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116.

[12] The cases on this point can scarcely be reconciled. In one instance a person ordered goods in the name of a fictitious firm, and the carrier's agent allowed a stranger to take the goods without any identification as to the firm to which they were consigned, though he knew of no such firm. Though the one who had ordered the goods had intended to defraud the shipper, and the goods were delivered to the one who had actually ordered them, though by a fictitious name, the carrier was held liable, since ordinary care was not used to ascertain the identity of the party. Price v. Oswego &c. R. Co., 50 N. Y. 213, 10 Am. Rep. 475; similarly, Winslow v. Vermont &c. R. Co., 42 Vt. 700, 1 Am. Rep. 365. An express company has been held liable when one sent a message asking a remittance of money, and the money was turned over to the person who sent the message, who was a swindler, without requiring further proof of identity than that he had sent the message (American Exp. Co. v. Fletcher, 25 Ind. 492), or even under similar circumstances where the swindler, who had personated the husband of one Mrs. Stack, showed a letter from Mrs. Stack, to whom he had telegraphed to forward certain goods, described the goods, and still being refused delivery, produced a person known to the agent of the carrier, who identified the swindler as Stack. American Express Co. v. Stack, 29 Ind. 27.

[13] The Drew, 15 Fed. 826; Edmunds v. Merchants' Despatch Transp. Co., 135 Mass. 283, 16 Am. & Eng. R. Cas. 250; Wilson v. Adams Exp. Co., 27 Mo. App. 360. Where a stranger in a certain town opened a store in the name of A. Swannick, and ordered cigars in that name, there being a cigar merchant named Arthur Swannick known to the vendor in the city with whom the shipper thought himself dealing, and the carrier first sought Arthur Swannick to deliver the cigars to him, and he refused to receive them, and delivery was then made to the man doing business as A. Swannick, to whom they were con-

same name.[14] If there are really two men of the same name, and delivery is made to the wrong one through error in directions, the carrier is not liable.[15] If the property is consigned to the consignee in care of an agent of the carrier, or the agent of the carrier can be held to be the agent of the consignee, a delivery to such agent seems to terminate the relation of carrier.[16] If shipped to the consignee in care of another, the delivery should be made to the consignee, but, if he cannot be found, to the one in whose care they were consigned,[17] and a delivery to the one in whose care they are shipped is a good delivery.[18]

If the goods are misdirected, the carrier is not liable, except for negligence,[19] unless he actually knows the correct direction, or by the use of ordinary diligence could have found it out.[20] Where one address is written on the package, and another on the receipt, it is no defense if the address on the package is correct, and the carrier has made the mistake in writing the receipt. If the package is incorrectly addressed, and the correct address is written in the receipt, evidence is admissible to the effect that

signed, the carrier was held not liable. Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467.

[14] Pacific Exp. Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177 and note, 52 Am. St. 324.

[15] Goods were billed by the shipper, who resided at the place of shipment, to himself, L. Singer, at Springfield, Illinois, as he had done in the past, the goods being received for him by one G. There was an L. Singer doing business in Springfield, Illinois, and though the carrier's agent knew that the consignor and consignee were of the same name, he delivered to the latter L. Singer, and since the shipping directions were not doubtful, and were followed, the delivery was good. Singer v. Merchants' &c. Transp. Co., 191 Mass. 449, 77 N. E. 882, 114 Am. St. 635. But where goods were consigned to "E. Kline" at Louisville, and the wrong street was named as his address, a delivery to "I. Kling" at such address was a misdelivery for which the carrier was liable. In this case the directions were ambiguous, not clear as in the case just cited. McCulloch v. McDonald, 91 Ind. 240.

[16] Fitzsimmons v. Southern Exp. Co., 40 Ga. 330, 2 Am. Rep. 577; Bennett v. Northern Pac. Exp. Co., 12 Ore. 49, 6 Pac. 160. But see Russell v. Livingston, 16 N. Y. 515.

[17] Schlesinger v. West Shore R. Co., 88 Ill. App. 273; United States Exp. Co. v. Hammer, 21 Ind. App. 186, 51 N. E. 953.

[18] Where goods are shipped in care of an express company, delivery to such company is a proper delivery. Commonwealth v. People's Exp. Co., 201 Mass. 564, 88 N. E. 420, 131 Am. St. 416.

[19] Elliott R. R. (2d ed.), § 1535; Erie R. Co, v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Southern Exp. Co. v. Kaufman, 12 Heisk. (Tenn.) 161.

[20] Mahon v. Blake, 125 Mass. 477; Guilbaume v. Transp. Co., 100 N. Y. 491.

the address is incorrect on the package, and the carrier attempted to deliver at such address.[21]

The carrier is, as we have seen, required to deliver in accordance with the bill of lading, and is held absolutely liable for failure to comply with its directions, and cannot safely deliver goods without production of the bill of lading as evidence of title.[22] He is liable for delivery upon an unindorsed bill taken out in the name of the consignor[23] unless he can show a binding custom to deliver goods billed straight to the consignee and not to his or the consignor's order upon production of way-bill.[24] If the shipment is under bill of lading "to order" of shipper, "notify" X, and has draft attached drawn by shipper, and the carrier delivers to X without surrender of bill of lading properly indorsed, and without the shipper's order, he is liable for full value to the shipper, for a carrier delivers at variance with bill of lading drawn "to order" at his peril.[25] When the carrier has notice of the true owner claiming under the consignee, and the bill of lading has been surrendered, he must deliver to the true owner, a bank which advanced upon drafts.[26] Wrongful delivery may be ratified by the owner.[27]

§ 229. **Place of delivery.**—Delivery must be made at a proper place.[28] In the case of a railroad carrier, it is generally at the depot, or warehouse at the station, to which it is shipped.[29] But delivery may be made elsewhere, by contract with the ship-

[21] Cappel v. Weir, 46 Misc. (N. Y.) 441, 92 N. Y. S. 365, 45 Misc. (N. Y.) 419, 90 N. Y. S. 394.

[22] Elliott R. R. (2d ed.), §§ 1426, 1523. See ante, § 145 et seq.

[23] Weyand v. Atchison &c. R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650n, 9 Am. St. 504 and note.

[24] Forbes v. Boston &c. R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76, 80. A shipper who for more than a year has been permitting delivery of goods without surrender of the bill of lading cannot hold the carrier liable for goods so delivered and not paid for. Salberg v. Pennsylvania R. Co., 228 Pa. 641, 77 Atl. 1007, 31 L. R. A. (N. S.) 1178.

[25] General Elec. Co. v. Southern R. Co., 72 S. Car. 251, 51 S. E. 695, 110 Am. St. 600.

[26] National Newark Banking Co. v. Delaware &c. R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. 825.

[27] Dobbin v. Mich. Cent. R. Co., 56 Mich. 522, 23 N. W. 204; Converse v. Boston R. Co., 58 N. H. 521; Reynolds v. New York Cent. &c. R. Co., 3 N. Y. S. 331; Cleveland, P. R. Co. v. Sargent, 19 Ohio St. 438.

[28] Elliott R. R. (2d ed.), § 1519; Bachant v. Boston & M. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408.

[29] Ray Freight Carriers, p. 888; Norway Plains Co. v. Boston &c. R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423.

per,[30] direction of consignee,[31] or custom to deliver at a public warehouse or elevator, known and acquiesced in by parties.[32]

§ 230. **Where goods are shipped to a certain place.**—If there is a station and a village near, both of the same name, it is held that unloading in the carrier's freight shed at the usual place at the station terminated the carrier's liability.[33] If goods are shipped where the carrier has no depot and no agent, they may be left on a sidetrack, and if there is no sidetrack, freight, which is not perishable, such as a carload of bricks, may be unloaded on the ground, even though the consignee is not present, and the carrier could not rightfully carry the goods to the next station.[34] By refusal to accept on other grounds, though the goods were tendered at an unusual place, the consignee may waive the right of delivery at the usual place.[35] It may be a conversion of the goods to deliver at the wrong place and fail to notify the shipper, as where the directions were to ship to Gates City, Va., and the carrier without the shipper's knowledge billed the goods to Preston, Va., where they lay and became valueless.[36]

§ 231. **Delivery as warehouseman.**—After the relation as carrier has terminated, and the goods are held as by a warehouseman, then there is no absolute duty to deliver rightly, but only to use ordinary care, as an ordinary bailee.[37] So where the carrier has tendered the goods as directed, and they have been refused, the relation of carrier is terminated, and he henceforward holds them as a warehouseman, and is not liable for delivery

[30] Rowe v. Pickford, 8 Taunt. 83; Dixon v. Baldwen, 5 East 175.

[31] London &c. R. Co. v. Bartlett, 7 H. & N. 400; Lewis v. Western R. Co., 11 Metc. (Mass.) 509; Sweet v. Barney, 23 N. Y. 335; Cleveland, P. R. Co. v. Sargent, 19 Ohio St. 438.

[32] Black v. Ashley, 80 Mich. 90, 44 N. W. 1120; Arthur v. St. Paul &c. R. Co., 38 Minn. 95, 35 N. W. 718.

[33] Elliott R. R. (2d ed.), § 1519; Richardson v. Canadian Pac. R. Co., 19 Ont. 369, 45 Am. & Eng. R. Cas. 413.

[34] Louisville &c. R. Co. v. Gilmer, 89 Ala. 534, 7 So. 654, 42 Am. & Eng. R. Cas. 450.

[35] Central of Georgia R. Co. v. Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. 58. And the mere fact that some of the articles are missing does not justify the consignee in refusing to receive the others.

[36] Cleveland, C. C. & St. L. R. Co. v. Potts, 33 Ind. App. 564, 71 N. E. 685.

[37] Hutchinson Carriers (3d ed.), §§ 681, 684; Stephenson v. Hart, 4 Bing. 476; Duff v. Budd, 3 Brod. & Bing. 177; Wilson v. Railroad Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685.

upon a forged order, if he has used ordinary care.[38] When the delivery is impossible because the consignee refused the goods, or could not be found, or when he delays for an unreasonable length of time in taking them away when it is his duty so to do, the relation of warehouseman is created,[39] and the carrier holding as warehouseman becomes liable only for misdelivery caused by negligence on his part.[40] So it is of much importance at what time the carrier's liability as such ends, and that of warehouseman begins. Generally, when he has done all the law requires in trying to effect a delivery, but has failed, he then holds the goods as a depositary or ordinary bailee.[41] This is often dependent upon the circumstances.

§ 232. **Delivery by water carriers.**—Water carriers have never been required to make delivery personally. They are held to the duty only to land at a wharf or proper place, and notify the owner.[42] Personal delivery would require them to use land transportation, and such is not expected of them. They must, however, provide a suitable and safe place to land the goods, and may not leave them unprotected and thus divest themselves of the carrier's responsibility, so it is the law that if the consignee does not take the goods directly from the carrier, the latter must keep

[38] Stephenson v. Hart, 4 Bing. 476; Duff v. Budd, 3 Brod. & Bing. 177; Heugh v. London &c. R. Co., L. R. 5 Exch. 51; Bush v. St. Louis &c. R. Co., 3 Mo. App. 62.

[39] Illinois Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; Manhattan Rubber Shoe Co. v. Chicago, B. & Q. R. Co., 9 App. Div. (N. Y.) 172, 75 N. Y. St. 544, 41 N. Y. S. 83. Where the carrier offers to deliver part of the goods and the consignee refuses to accept because part is missing, the relation of carrier is ended as to the goods refused. Louisville &c. R. Co. v. Gay, 143 Ky. 56, 135 S. W. 400, 33 L. R. A. (N. S.) 303; North Yakima Brewing & Malting Co. v. Northern Pac. R. Co., 49 Wash. 375, 95 Pac. 486, 16 L. R. A. (N. S.) 935n.

[40] Hudson v. Baxendale, 2 Hurl. & N. 575; Hasse v. American Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. 328; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Weed v. Barney, 45 N. Y. 344; Fisk v. Newton, 1 Denio (N. Y.) 45, 43 Am. Dec. 649; Byrne v. Fargo, 36 Misc. (N. Y.) 543, 73 N. Y. S. 943; Neal v. Wilmington &c. R. Co., 8 Jones L. (N. Car.) 482; Kremer v. Southern Exp. Co., 6 Cold. (Tenn.) 356.

[41] Hutchinson Carriers (3d ed.), § 686; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Louisville &c. R. Co. v. Gay, 143 Ky. 56, 135 S. W. 400, 33 L. R. A. (N. S.) 303.

[42] Hyde v. Trent & Mersey Nav. Co., 5 T. R. 389; Union Steamboat Co. v. Knapp, 73 Ill. 506; Chickering v. Fowler, 4 Pick. (Mass.) 371; Rosenstein v. Vogemann, 184 N. Y. 325, 6 Am. & Eng. Ann. Cas. 13, and see note for general discussion of delivery by water carrier; Cope v. Cordova, 1 Rawle (Pa.) 203.

them until he has had reasonable time after notice to come for them.[43] After keeping them a reasonable time for removal after notifying the consignee, he may store the goods, and escape any extraordinary liability.[44] If the consignee refuses the goods the carrier must place them in safe keeping, and then his carrier's liability is terminated.[45] Notice to the consignee must be actual, and not constructive,[46] but may be made to his agent.[47] If he is expected to remove the goods upon the same day notice is given, he must have opportunity to remove them before the expiration of business hours, and if the removal is not completed, he will have a reasonable time the next day for the same, and the carrier is in the meantime liable for the safety of such of the goods as could not have been removed in ordinary diligence.[48] The water carrier must separate the consignee's goods from those of others, so that he may easily remove them, and they are not ready for delivery until this is done.[49] The consignee cannot be required to remove the goods upon Sunday or a legal holiday when labor is forbidden. But if the day is a holiday or fast day, but not one on which labor is forbidden, such fact is no excuse for failure to remove the goods.[50] The consignee is only entitled to remove the goods to a safe place at a reasonable distance, and he must

[43] Hutchinson Carriers (3d ed.), § 688; note, 97 Am. St. 99, and cases further cited; The Captain John, 33 Fed. 927; The Titania, 124 Fed. 975; The Scandinavia, 49 Fed. 658; Price v. Powell, 3 N. Y. 322; Redmond v. Liverpool Steamboat Co., 56 Barb. (N. Y.) 320, 46 N. Y. 578, 5 Am. Rep. 390; Richardson v. Goddard, 23 How. (U. S.) 28, 16 L. ed. 412; The Eddy, 5 Wall. (U. S.) 481, 18 L. ed. 486.

[44] See cases cited in note 43; The Titania, 131 Fed. 229, 65 C. C. A. 215; The Ravendale, 75 Fed. 408, 410, 413; The Richard Winslow, 67 Fed. 259, 71 Fed. 426, 18 C. C. A. 344; Rosenstein v. Vogemann, 102 App. Div. (N. Y.) 39, 92 N. Y. S. 86, affd. 184 N. Y. 325, 77 N. E. 625; McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. 350.

[45] See cases cited in note 43.

[46] Kohn v. Packard, 3 La. 225; McKeon v. See, 4 Robt. (N. Y.) 449; Solomon v. Philadelphia &c. Steamboat Co., 2 Daly (N. Y.) 104.

[47] King v. New Brunswick &c. Steamship Co., 36 Misc. (N. Y.) 555, 73 N. Y. S. 999.

[48] Segura v. Reed, 3 La. Ann. 695; Price v. Powell, 3 N. Y. 322.

[49] The Titania, 131 Fed. 229, 65 C. C. A. 215; The Eddy, 5 Wall. (U. S.) 481, 18 L. ed. 486; The Ben Adams, 2 Ben. (U. S.) 445; 3 Kent's Com. 215.

[50] Gates v. Ryan, 37 Fed. 154; Richardson v. Goddard, 23 How. (U. S.) 28, 16 L. ed. 412. It was held that since the Fourth of July is not a legal holiday in New York, there is no legal reason preventing the consignee from accepting goods tendered on that day, but that a usage not to receive goods on that day might be shown. Russell Mfg. Co. v. The New Haven Steamboat Co., 50 N. Y. 121. And in Schen v. Benedict, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. 426n, it was said that a consignee is not

bear the risk of unreasonable delay,[51] as when he takes time to haul the goods to an unusual distance. Notice given to the consignee by the water carrier is largely equivalent to delivery personally by the land carrier, and he must use reasonable diligence to give such notice, and unless notice is given or until there is a due effort to give such notice, which has failed, he continues liable as a carrier.[52] An established course of dealing between the parties or the uniform usage of business, in a particular trade in the locality, such usage being held to enter into the contract,[53] may waive the necessity of notice,[54] whether or not known to the shipper. Likewise the necessity of notice may be waived by contract.[55] When a specified landing place is mentioned in the contract, delivery must be made there,[56] but if the contract is silent as to place, the delivery must or may be made at the usual place according to the usage of the port, or the custom of business between the parties,[57] or, if there is no regular place, at the place directed by the consignee.[58] It may be provided by contract that the delivery shall be made at the ship's tackle,[59] or, by usage of the port, delivery to the custom house officers is a good delivery,[60] and there may be shown a carrier's usage to retain con-

required to unload a vessel on the Fourth of July.

[51] Liverpool &c. S. Co. v. Suitter, 17 Fed. 695, affd. 22 Fed. 560; Hedges v. Hudson River R. Co., 49 N. Y. 223; Wynantskill Knitting Co. v. Murray, 90 Hun (N. Y.) 554, 36 N. Y. S. 26.

[52] Union Steamboat Co. v. Knapp, 73 Ill. 506; Zinn v. N. J. Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402; Sherman v. Hudson River R. Co., 64 N. Y. 254.

[53] Stone v. Rice, 58 Ala. 95; Illinois Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; Loveland v Burke, 120 Mass. 139, 21 Am. Rep. 507; Gibson v. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Farmers' & Merchants' Bank v. Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491, 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68.

[54] Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Ely v. New Haven Steamboat Co., 6 Abb. Pr. (N. S.) 72 (N. Y.), 53 Barb. (N. Y.) 207.

[55] The Boskenna Bay, 40 Fed. 91. 6 L. R. A. 172; Constable v. National Steamship Co., 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. 1062.

[56] Johnston v. Davis, 60 Mich. 56, 26 N. W. 830; Stricker v. Leathers, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600.

[57] Hewlett v. Burrell, 105 Fed. 80, 44 C. C. A. 362; Dixon v. Dunham, 14 Ill. 324, Jameson v. Sweeney, 32 Misc. (N. Y.) 645, 66 N. Y. S. 494; Richmond v. Union Steamboat Co., 87 N. Y. 240; Salmon Falls Mfg. Co. v. The Tangier, 1 Cliff. (U. S.) 396, Fed. Cas. No. 12256.

[58] Smith v. Lee, 66 Fed. 344, 13 C. C. A. 506; Dixon v. Dunham, 14 Ill. 324; Richmond v. Union Steamboat Co., 87 N. Y. 240.

[59] Smith v. Britain S. Co., 123 Fed. 176; Ames Mercantile Co. v. Kimball Steamship Co., 125 Fed. 332.

[60] The Asiatic Prince, 108 Fed. 287,

trol of fruit until after sorted and sold at auction.[61] The terms of a bill of lading will govern over the custom of a port.[62]

§ 233. **Delivery by railroads.**—Since a railroad's cars move upon fixed lines, and they, like water carriers, cannot deliver personally unless they use outside methods of transportation, they are not held to deliver in person, and are allowed to make delivery at fixed places along their routes. Three rules are followed by our courts as to when the common carrier's liability ends, or as to whether notice is necessary.

§ 234. **Massachusetts rule.**—The courts of Massachusetts hold that all that is necessary for a railroad to do is to deposit the goods safely upon the platform or in the warehouse of the road at the station of their destination, and that no notice to the consignee of their arrival is necessary, but that when the goods are so safely deposited, the liability of the carrier as such is ended. The theory of the rule is that the consignee is always advised of the beginning of the transportation of the goods, that he knows with reasonable certainty when they will arrive since railroad transportation is very regular, that it would be almost impossible for the railroad to send out so many notices, and that it is better to put upon the consignee the duty of inquiring about the time of arrival of the goods than to impose upon the carrier the duty to notify.[63] This rule has been followed by the courts in Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, South Carolina and Pennsylvania.[64]

47 C. C. A. 325; The Segurawca, 68 Fed. 1014.

[61] Hart v. Pearson, 12 Rap. Jud Que. (C. S.) 540.

[62] Parsons v. Hart, 30 Can. Sup. Ct. 473.

[63] Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423; Thomas v. Boston & P. R. Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Rice v. Hart, 118 Mass. 201, 19 Am. Rep. 433. But if the carrier has no freight house and the consignees unload from the cars, the transportation is not ended until the consignee is notified and the car placed where it can be conveniently unloaded, for a carrier is required to provide a safe, proper place for delivery. Bachant v. Boston & M. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408.

[64] Georgia &c. R. Co. v. Pound, 111 Ga. 6, 36 S. E. 312; Illinois Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; Schumacher v. Chicago &c. R. Co., 207 Ill. 199, 69 N. E. 825; Pittsburg, C. C. & St. L. R. Co. v. Nash, 43 Ind. 423; Mohr v. Chicago & N. W. R. Co., 40 Iowa 579; Herf &c. Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346; Chalk v. Charlotte &c. R. Co., 85 N. Car. 423; Shenk v.

§ 235. New Hampshire rule.—But the courts of New Hampshire hold that as trains are more or less irregular in their hours of arrival at stations, and as goods often arrive after business hours, when it is impossible for the consignee to take them away, the carrier is liable as an insurer until the consignee has a reasonable time in which to take the goods away.[65] This rule has been followed in Alabama, Arkansas, Kansas, Kentucky, Louisiana, Vermont, West Virginia and Wisconsin.[66] Under both these rules the carrier must deposit the goods safely in a suitable place, before termination of the carrier's liability,[67] and the rules apply only to delivery at destination, and not to delivery to a succeeding carrier.[68] Both are a great departure from the general law of carriers and their reasoning is often disapproved. Hutchinson, disapproving both rules, says that "it may not be always true that the person to whom the goods are sent is advised of the fact; and common experience teaches that, * * * the frequent delays occasioned by excess of freight and various other circumstances make the time of arrival of goods consigned by railways oftentimes as uncertain perhaps as it would be by any other mode of transportation," and though railway carriers usually have secure warehouses, yet the goods are in the carrier's custody, and may be embezzled by its servants, and the owner may not know of their arrival.[69]

Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541; Spears v. Spartanburg &c. R. Co., 11 S. Car. 158.

[65] Maignan v. New Orleans &c. Co., 24 La. Ann. 333; Moses v. Boston & M. R. Co., 32 N. H. 523, 64 Am. Dec. 381; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Berry v. West Virginia &c. R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am St. 781; Backhaus v. Chicago & N. W. R. Co., 92 Wis. 393, 66 N. W. 400.

[66] Tallahassee Falls Mfg. Co. v. Western R. Co., 128 Ala. 167, 29 So. 203; Arkansas Southern R. Co. v. German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. 160; Missouri Pac. R. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. 208; Missouri Pac. R. Co. v. Newberger, 67 Kans. 846, 73 Pac. 57; Lewis v. Louisville &c. R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A. (N. S.) 938 and note, 21 Am. & Eng. Ann. Cas. 527 and note.

[67] Alabama &c. R. Co. v. Kidd, 35 Ala. 209; Chicago & N. W. R. Co. v. Bensley, 69 Ill. 630; Bachant v. Boston & M. R. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408; Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164.

[68] Hutchinson Carriers (3d ed.), §§ 131, 706; Texas &c. R. Co. v. Reiss, 183 U. S. 621, 46 L. ed. 358, 22 Sup. Ct. 253.

[69] Hutchinson Carriers (3d ed.), § 707. But compare Elliott R. R. (2d ed.), § 1527a.

§ 236. **New York rule.**—The New York rule is that if the consignee is present when the goods arrive, he must remove them without unreasonable delay; if he is not present, but lives near the place of delivery, the carrier must notify him of the arrival, and he then must have a reasonable time to take them away; if he is absent, unknown, or not to be found, the carrier may store them; and if he has had a reasonable time after notice, and has failed to remove them, the carrier is no longer an insurer.[70] This rule is followed in Michigan, Minnesota, Mississippi, North Carolina and Ohio,[71] while statutes in Alabama, California, Tennessee and Texas[72] have brought about a similar effect, and the English rule is the same.[73] The Delaware, Maryland, Nebraska, Oregon and Washington courts[74] lean toward the New York rule, and in New Jersey the rule is a combination of the New Hampshire and New York rules,[75] being apparently the same for railroads and express companies.

§ 237. **When notice is unnecessary or immaterial.**—If the consignee demands the goods, which have already arrived, and is informed that they have not yet come, the railroad company continues liable as an insurer.[76] If the consignee actually knows

[70] Fenner v. Buffalo R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Hedges v. Hudson Riv. R. Co., 49 N. Y. 223; McDonald v. The Western R. Corp., 34 N. Y. 497; Sprague v. New York Cent. R. Co., 52 N. Y. 637; Pelton v. The Rensselaer &c. R. Co., 54 N. Y. 214, 13 Am. Rep. 568.

[71] Buckley v. Great Western R. Co., 18 Mich. 121; Walters v. Detroit United R. Co., 139 Mich. 303, 102 N. W. 745; Pinney v. First Division of St. P. &c. R. Co., 19 Gil. (Minn.) 211; Gulf &c. R. Co. v. Fuqua, 84 Miss. 490, 36 So. 449; Poythress v. Durham &c. R. Co., 148 N. Car. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427; Lake Erie &c. R. Co. v. Hatch, 52 Ohio St. 408, 39 N. E. 1042, 11 Am. R. & Corp. 611.

[72] Collins v. Alabama G. S. R. Co., 104 Ala. 390, 16 So. 140; Wilson v. California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Missouri Pac. R. Co. v. Haynes, 72 Tex. 175, 10 S. W. 398.

[73] Mitchell v. Lancashire &c. R. Co., L. R. 10 Q. B. 256; Chapman v. Great Western R. Co., 5 Q. B. Div. 278.

[74] McHenry v. Philadelphia &c. R. Co., 4 Har. (Del.) 448; United Fruit Co. v. New York &c. Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240n, 10 Am. & Eng. Ann. Cas. 437; Burlington &c. R. Co. v. Arms, 15 Nebr. 69, 17 N. W. 351; Normile v. Oregon Nav. Co., 41 Ore. 177, 69 Pac. 928; McGregor v. Oregon &c. R. Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668; Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

[75] Burr v. Adams Exp. Co., 71 N. J. L. 263, 58 Atl. 609; Morris &c. R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

[76] East Tennessee &c. R. Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. 902; Berry v. West Virginia R. Co., 44

of the arrival, notice is unnecessary.[77] Usage may control as to the place of delivery, and may excuse the giving of notice, or may make the giving of notice necessary.[78] Though notice may be given to consignee's agent, notice to a transfer company or drayman in the habit of hauling goods is not notice to the consignee.[79]

§ 238. When liability as warehouseman begins.—In this country, bulky freight is unloaded by the consignee, and it is only required that the company shall place the cars where they may be safely and conveniently unloaded, or carry them to a place named in the contract, and, if by law, usage, or contract notice is required, notify the proper party. The carrier is then liable only as a warehouseman in states where the Massachusetts rule prevails, and after a reasonable time assumes such liability in other states.[80] The same applies to small package freight except that the consignee is under no obligation to unload. What is a reasonable time depends upon the circumstances of the case, and is

W. Va. 538, 30 S. E. 143, 67 Am. St. 781. If goods shipped over the railroad reach the destination and when consignee applies for them he is told that the waybill is not yet made out and will not be that day, this is equivalent to telling him that they cannot then be delivered, and the railroad company remains liable as a carrier for subsequent loss by fire without negligence. Fisher v. Northern Pac. R. Co., 49 Wash. 258, 94 Pac. 1073, 126 Am. St. 867. The converse was held true where the consignee was told that the bills would be ready and the goods ready to deliver in the afternoon, and the consignee did not call for them and they were destroyed by fire that night. It was held that a reasonable time was given. North Yakima &c. R. Co. v. Northern Pac. R. Co., 49 Wash. 375, 95 Pac. 486, 16 L. R. A. (N. S.) 935n.

[77] Rinney v. St. Paul &c. R. Co., 19 Minn. 251; Feimer v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709. Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271. One who consigns goods to himself at a place where he does not reside and has no agent is not entitled to notice. Denver &c. R. Co. v. Peterson, 30 Colo. 77, 69 Pac. 578, 97 Am. St. 76. Under similar circumstances, if the bill of lading requires notice to be given to the consignee, he must put himself in a position to receive notice. St. Louis, I. M. & S. R. Co. v. Townes, 93 Ark. 430, 124 S. W. 1036, 26 L. R. A. (N. S.) 572n.

[78] Bachant v. Boston &c. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408; Herf & Trerichs Chem. Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346; McMasters v. Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264.

[79] Hockfield v. Southern R. Co., 150 N. Car. 419, 64 S. E. 181, 134 Am. St. 945; Berry v. West Va. &c. R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. 781.

[80] Kenny v. Atlantic &c. R. Co., 122 Ga. 365, 50 S. E. 132; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Kirk v. Chicago &c. R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. 397; Whitney Mfg. Co. v. Richmond &c. R. Co., 38 S. Car. 365, 17 S. E. 147, 37 Am. St. 767. Delivery is complete when

a question of law if facts are undisputed.[81] Perhaps the best definition of a reasonable time is that of Mr. Wood quoted in Elliott on Railroads.[82] "What is meant by a reasonable time is such as would give a person residing at the place to which the goods are consigned, and informed of the usual course of business on the part of the company, a suitable opportunity within business hours after the goods are ready for delivery, to come to the place of delivery, inspect the goods and take them away." Goods held at the request of the consignee for his convenience are held as a warehouseman.[83]

§ 239. **Liability as warehouseman.**—When the carrier becomes a warehouseman he becomes an ordinary bailee for hire, and may charge for the storage, custody and protection of the goods, which is a service distinct from transportation, for whatever time they remain in his care after a reasonable time has elapsed for their removal.[84] As a bailee, he must use ordinary care to keep the goods safely for the owner, and for negligence in this respect is liable.[85] If the consignee has refused to accept the goods, he remains bailee for the owner, whoever he may be.[86] When once the liability as a warehouseman has attached, it continues as long as the goods are in the custody of the carrier.[87] The warehouseman, like the water carrier, must give the consignee reasonable opportunities to get the goods from the place of deposit.[88]

consignee's agent has entered car and broken seal. Rothschild v. Northern Pac. R. Co., 68 Wash. 527, 123 Pac. 1011, 40 L. R. A. (N. S.) 773, and note.

[81] Hutchinson Carriers (3d ed.), § 712; Elliott R. R. (2d ed.), § 1528; Roth v. Buffalo &c. R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

[82] Elliott R. R. (2d ed.), § 1528.

[83] United Fruit Co. v. New York &c. Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240n. 10 Am. & Eng. Ann. Cas. 437 and cases cited in note.

[84] Cairns v. Robins, 8 M. & W. 258; White v. Humphrey, 11 Q. B. 43; Hardman v. Montana Union R. Co., 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 300; Schumacher v. Chicago & N. W. R. Co., 207 Ill. 199, 69 N. E. 825.

[85] Cases cited in note 84 just preceding; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 110, 17 N. E. 721, 6 Am. St. 550; Walker v. Eikleberry, 7 Okla. 599, 54 Pac. 553.

[86] Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96.

[87] Cairns v. Robins, 8 M. & W. 258; Mitchell v. Lancashire & Yorkshire R. Co., L. R. 10 Q. B. 256; Brown v. Grand Trunk R. Co., 54 N. H. 535.

[88] Independence Mills Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; Bachant v. Boston &c. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408; East Ten-

§ 240. Delivery by express companies.—Express companies are required to make personal delivery, to which they are held closely, since their undertaking is to carry small packages and deliver personally,[89] but they may dispense with this liability at small way stations of a railroad, upon giving prompt notice, it being supposed that the parties contracted with reference to such a usage,[90] and an express company in a city may establish limits beyond which its agents need not go to make a delivery.[91] To a certain degree, the courts have held that an express company is excusable by usage for failure to deliver personally, so that it has been held that delivery to the clerk of a government bakery of a package for one of its employés was justified by custom,[92] or delivery of packages for students to the president of a college,[93] delivery to a bank after banking hours,[94] or the delivery to a department employé of a letter enclosing a bid and samples of car seals for the United States addressed to the Secretary of the Treasury personally,[95] but in general these companies are not allowed to restrict their liability for personal delivery by proof of usage, since such service is a very element of their holding out as carriers.[96]

§ 241. Further of delivery—Notice to consignor.—It seems that if the consignee refuses to accept the goods, the carrier should be held under the duty to notify the consignor since he

nessee &c. R. Co. v. Hunt, 15 Lea (Tenn.) 261.

[89] Hutchinson Carriers (3d ed.), § 716; Baldwin v. American Exp. Co., 23 Ill. 197, 74 Am. Dec. 190; Witbeck v. Holland, 55 Barb. (N. Y.) 443, 45 N. Y. 13, 6 Am. Rep. 23; Marshall v. American Exp. Co., 7 Wis. 1, 73 Am. Dec. 381.

[90] Southern Exp. Co. v. Holland, 109 Ala. 362, 19 So. 66; Baldwin v. American Exp. Co., 23 Ill. 197, 74 Am. Dec. 190; Gulliver v. Adams Exp. Co., 38 Ill. 503; Laporte v. Wells Fargo Exp. Co., 23 App. Div. (N. Y.) 267, 48 N. Y. S. 292. For a case in which an express company though it failed to send notice where delivery was made only at its office, was yet held liable only as a warehouseman for the loss of a package by theft, when, if notice had been sent, the owner could not have removed the package in time to avoid loss, see Hutchinson v. United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393.

[91] State v. Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93n; Ballard v. American Exp. Co., 107 Mich. 695, 65 N. W. 551, 33 L. R. A. 66, 61 Am. St. 358.

[92] Sullivan v. Thompson, 99 Mass. 259.

[93] Southern Exp. Co. v. Everett, 37 Ga. 688.

[94] Marshall v. American Exp. Co., 7 Wis. 1, 73 Am. Dec. 381.

[95] Aldrich Car-Seal Mfg. Co. v. American Exp. Co., 117 Mich. 32, 65 N. W. 94.

[96] Haslam v. Adams Exp. Co., 6 Bosw. (N. Y.) 235.

must presume that the latter is yet the owner of the goods,[97] although the opposite is held in some cases.[98] There is no duty to give notice in any case to the consignor except when there is a duty to make a personal delivery, or to give notice to the consignee.[99]

§ 242. **Carrying goods C. O. D.**—Very often goods are carried, usually by express, to be delivered only in case they are paid for. Thus the carrier becomes the agent of the consignor to collect the payment and if he delivers the goods without collection of the amount instructed, he is liable to the consignor.[1] It is not a part of the implied duty of a carrier to collect money for goods, but such duty must arise from contract and may be created by the carrier's accepting goods marked C. O. D.[2] If the carrier professes to carry goods C. O. D. he will be held to carry for the public on these terms, and, in such case, a contract may be implied if he accepts goods clearly marked with the price and the letters C. O. D.[3] The contract to collect being apart from the carrier's undertaking as a carrier, it may be oral, while the contract of carriage of the goods is contained in the carrier's receipt.[4] A carrier who has not been in the custom of carrying goods C. O. D. cannot be made liable for collection merely by accepting a package so marked.[5] The carrier must allow the consignee a reasonable time in which to pay for the goods,[6] but if they are once tendered to him and he refuses, even though he only wants a reasonable time in which to pay for them, the carrier holds as warehouseman.[7] If goods sent to be paid for upon delivery have

[97] Green & Barren River Nav. Co. v. Marshall, 48 Ind. 596; The Eddy, 5 Wall. (U. S.) 481, 18 L. ed. 486; Beedy v. Pacey, 22 Wash. 94, 60 Pac. 56.

[98] Mayell v. Potter, 2 Johns. Cas. (N. Y.) 371; Fenner v. Buffalo R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Bremer v. Southern Exp. Co., 6 Cold. (Tenn.) 356.

[99] Hutchinson Carriers (3d ed.), § 724.

[1] Cox v. Columbus &c. R. Co., 91 Ala. 392, 8 So. 824, 49 Am. & Eng. R. Cas. 111 and note; Meyer v. Lemcke, 31 Ind. 208; Old Colony R. Co. v. Wilder, 137 Mass. 536; Jelletts v. St. Paul &c. R. Co., 30 Minn. 265, 15 N. W. 237, 16 Am. & Eng. R. Cas. 246.

[2] Fowler v. Chicago, R. I. & P. R. Co., 98 Mo. App. 210, 71 S. W. 1077.

[3] American Exp. Co. v. Lesem, 39 Ill. 312; United States Exp. Co. v. Keefer, 59 Ind. 263.

[4] Union Railroad & Transp. Co. v. Riegel, 73 Pa. St. 72.

[5] Chicago & N. W. R. Co. v. Merrill, 48 Ill. 425.

[6] Great Western R. Co. v. Crouch, 3 H. & N. 183.

[7] Hasse v. American Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. 328.

been obtained by the consignee without payment, through the negligence of the carrier, or through imposition, either the carrier or the consignor may recover them, except against a bona fide purchaser from the consignee.[8] It seems that the liability for the safe return of the money after collection is that of an insurer, even though there is no direct compensation.[9] The agent of a railroad company has no authority to guarantee the payment of the price of the goods shipped.[10]

§ 243. **Consignee's rights as to C. O. D. shipments.**—The carrier is bound to give the consignee a right to inspect the goods, even if he has instructions not to deliver them until paid for.[11] So if the carrier has allowed the consignee to deposit the money and take away the goods for inspection, he may return to him his money if they are unsatisfactory,[12] or if the consignor has attempted to defraud the consignee, as where goods represented as valuable were sent for a certain amount of money to be collected, and when they were opened were found to be waste paper, the carrier could return the money to the consignee.[13] As the consignee is presumptively the owner,[14] a delivery in compliance with his directions will discharge the carrier, although the consignor has directed delivery in a different manner. If the carrier knows that the goods do not belong to the consignee, but that the consignee is merely the agent of the owner, he is not allowed to vary the consignor's directions as to delivery.[15] No change in destination can be made after the goods have reached the original destination.[16]

[8] Norfolk Southern R. Co. v. Barnes, 104 N. Car. 25, 10 S. E. 83, 5 L. R. A. 611.

[9] Hutchinson Carriers (3d. ed.), § 731; Kemp v. Coughtry, 11 Johns. (N. Y.) 107.

[10] Weikle v. Minneapolis &c. R. Co., 64 Minn. 296, 66 N. W. 963.

[11] Brand v. Weir, 27 Misc. (N. Y.) 212, 57 N. Y. S. 731; Sloan v. Carolina Cent. R. Co., 126 N. Car. 487, 36 S. E. 21.

[12] Lyons v. Hill, 46 N. H. 49, 88 Am. Dec. 189.

[13] Herrick v. Gallagher, 60 Barb. (N. Y.) 566.

[14] Hutchinson Carriers (3d ed.), § 735; London &c. R. Co. v. Bartlett, 7 H. & N. 400; Pratt v. Northern Pac. Exp. Co., 13 Idaho 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499, 121 Am. St. 268.

[15] Thompson v. Fargo, 49 N. Y. 188, 10 Am. Rep. 342; Southern Exp. Co. v. Dickson, 94 U. S. 549, 24 L. ed. 285.

[16] Melbourne v. Louisville &c. R. Co., 88 Ala. 443, 6 So. 762.

§ 244. Excuses for nondelivery—Seizure under legal process.—The legally excepted perils previously discussed, which excuse a carrier for loss, thus excuse him from delivery. A carrier is also excused when the goods have been taken from him by valid process of law.[17] In Massachusetts, it is held that to excuse the carrier, this process must have been against the actual owner of the goods.[18] It seems that the requirement of validity means no more than that the process must be issued by a court having jurisdiction of the subject, and be fair on its face, "for if it would justify the officer in serving it, it ought to justify the carrier in yielding to it."[19] The carrier must give notice to the owner of the seizure of the goods,[20] and it is held under the maritime law that the carrier by water must defend the suit until the owner is notified and has reasonable opportunity to take up the litigation.[21] To excuse him, the carrier must have been guilty of no laches or collusion connected with the seizure of the goods.[22] He must promptly give notice to the owner.[23] It seems that goods in the hands of the carrier in transitu cannot be made subject to garnishment or trustee process,[24] but if they are

[17] Hutchinson Carriers (3d ed.), § 738; Verrall v. Robinson, Tyrwhitts' Exch. 1069, 4 Dowling 242; Indiana &c. R. Co. v. Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. 264; Pingree v. Detroit &c. R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. 479; Mierson v. Hope, 2 Sweeney (N. Y.) 561; Jewett v. Olsen, 18 Ore. 419, 23 Pac. 262, 17 Am. St. 745; Stiles v. Davis, 1 Black. (U. S.) 101, 17 L. ed. 33.

[18] Edwards v. Transit Co., 104 Mass. 159, 6 Am. Rep. 213; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. 301.

[19] Hutchinson Carriers (3d ed.), § 742; Elliott R. R. (2d ed.), § 1537; McAlister v. Chicago R. Co., 74 Mo. 351; note to Kohn v. Richmond &c. R. Co., 37 S. Car. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. 726; Stiles v. Davis, 1 Black. (U. S.) 101, 17 L. ed. 33.

[20] Ohio &c. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Merz v. Chicago & N. W. R. Co., 86 Minn. 33, 90 N. W. 7; Bliven v. Hudson River R. Co., 36 N. Y. 403; Mierson v. Hope, 2 Sweeney (N. Y.) 561; Baltimore &c. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579.

[21] The M. M. Chase, 37 Fed. 708; Lemon v. Walker, 9 Mass. 404; Hannay v. Eve, 3 Cranch (U. S.) 242, 2 L. ed. 427; The Mary Ann Guest, Olcott (U. S.) 501, 1 Blatchf. (U. S.) 358, Fed Cas. No. 9196.

[22] Bennett v. American Exp. Co., 83 Maine 236, 22 Atl. 159, 13 L. R. A. 33n, 23 Am. St. 774; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117n, 34 Am. St. 579; Jewett v. Olsen, 18 Ore. 419, 23 Pac. 262, 17 Am. St. 745.

[23] Baldwin v. Great Northern R. Co., 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. 370; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117n, 34 Am. St. 579.

[24] Elliott R. R. (2d ed.), § 1538; Western &c. R. Co. v. Thorriton, 60 Ga. 300; Baldwin v. Great Northern R. Co., 81 Minn. 247, 83 N. W. 98, 51 L. R. A. 640, 83 Am. St. 370;

in the carrier's possession and transit has either not begun or has been completed, or if they are held as by a warehouseman awaiting delivery, they may be subject.[25] The rule is that attachment against the consignor will not be effective, since the presumption is that the consignee is owner, but this presumption is rebuttable.[26] Whenever the carrier is satisfied that one who sets up a claim to the goods is the real owner, he may deliver up possession to him without legal proceedings, but he must show clearly in an action against him by the consignor or consignee that the claimant was the legal owner,[27] and the carrier cannot of his own motion set up the adverse claim of another as an excuse for withholding the goods from the bailor.[28] However, if an adverse claimant has requested him not to deliver the goods according to his contract, he may prove in an action by the consignee or consignor that such claimant was the real owner, but if he is not, the carrier's refusal to deliver is a conversion.[29] Further, if the claimant should be the real owner, and the carrier should refuse to deliver the goods to him, he would also be guilty of conversion.[30] Where the carrier is placed between conflicting claimants, and may be liable to either for conversion, if he delivers to the other, and such other should prove not to be the true owner, it may be better for the carrier to bring the goods into court by an

Bates v. Chicago, M. & St. P. R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369.

[25] Cooley v. Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. 609, citing Drake Attachment 453; Pittsburg, C. C. & St. L. R. Co. v. Cox, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377; Stiles v. Davis, 1 Black (U. S.) 101, 17 L. ed. 33.

[26] Elliott R. R. (2d ed.), § 1538; Redd v. Burrus, 58 Ga. 574; Pittsburg, C. C. & St. L. R. Co. v. Cox, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377; Bingham v. Lamping, 26 Pa. St. 340, 67 Am. Dec. 418.

[27] Hutchinson Carriers (3d ed.), § 749; Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313, 119 Am. St. 327; Shellenbery v. Fremont &c. R. Co., 45 Nebr. 487, 63 N. W. 859, 50 Am. St. 561; Rosenfield v. Express Co., 1 Woods (U. S.) 131; The Idaho, 93 U. S. 575, 11 Blatchf. (U. S.) 218.

[28] Hutchinson Carriers (3d ed.), § 750; Valentine v. Long Island R. Co., 92 N. Y. S. 645; Wells v. American Exp. Co., 55 Wis. 23, 42 Am. Rep. 695.

[29] Hutchinson Carriers (3d ed.), § 752.

[30] Lester v. Delaware, L. & W. R. Co., 73 Hun (N. Y.) 398, 26 N. Y. S. 206. In a case where the plaintiff was neither consignee, consignor nor assignee of the bill of lading, but was the owner of the goods and the ground of refusal to deliver to him was solely his failure to pay additional freight charges, it was held the plaintiff might maintain trover where the carrier sold the goods for such charges. Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. 108.

interpleader.[31] The carrier may take a reasonable time to investigate the title of the goods, if demand is made by another than the shipper or the consignee,[32] and is not liable to the holder of an adverse claim if delivery is made before his claim is set up.[33] He is not liable for refusing to allow goods to be taken on a legal process against one other than the owner.[34] The carrier is not liable for loss of goods during detention by the custom officials if destroyed by a fire which he did not cause and could not prevent,[35] but if the goods are held for the payment of duties, it is his duty to turn the goods over to the authorities, or store them in a safe place, and notify the consignees or the shippers.[36] A commendable motive on the ground of public policy is no defense for a failure to deliver by the carrier, as where fire-arms were delivered to be carried to a town in which there was an insurrection, and by the advice of the governor of the state the fire-arms were carried out of the state, the carrier was held liable for conversion.[37] The consignee's refusal to accept excuses nondelivery.[38] An order by quarantine officers not to deliver may be a defense for failure to deliver or delay in delivery, as where the Vicksburg quarantine officers refused to allow bananas shipped from New Orleans to be unloaded.[39]

§ 245. **Stoppage in transitu.**—The carrier may excuse nondelivery upon the ground that the vendor has exercised the right of stoppage in transitu which he has after selling goods on credit and discovering the insolvency of the buyer.[40] This right is founded on the principle that the property of one person who

[31] Elliott R. R. (2d ed.), §1544; Shellenberg v. Fremont &c. R. Co., 45 Nebr. 487, 63 N. W. 859, 50 Am. St. 561, 12 Lewis Am. R. & Corp. 27.

[32] Solomons v. Dawes, 1 Esp. 83; Merz v. Chicago &c. R. Co, 86 Minn. 33, 90 N. W. 7; Rogers v. Weir, 34 N. Y. 463.

[33] Sheridan v. New Quay Co., 4 C. B. (N. S.) 618, 93 E. C. L. 618; Shellenberg v. Fremont &c. R. Co., 45 Nebr. 487, 63 N. W. 859, 50 Am. St. 561.

[34] Simpson v. Dufour, 126 Ind. 322, 26 N. E. 69, 95 Ind. 302.

[35] Parker v. North German Lloyd Steamship Co., 74 App. Div. (N. Y.) 16, 76 N. Y. S. 806; Howell v. Grand Trunk R. Co., 92 Hun (N. Y.) 423, 36 N. Y. S. 544.

[36] Pennsylvania Co. v. Canadian Pac. R. Co., 107 Ill. App. 386.

[37] Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579.

[38] Central of Ga. R. Co. v. Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. 58.

[39] Alabama & V. R. Co. v. Tirelli, 93 Miss. 797, 48 So. 962, 21 L. R. A. (N. S.) 731 and note, 136 Am. St. 559, 17 Am. & Eng. Ann. Cas. 879.

[40] For further discussion of Stoppage in Transitu see article on Sales.

has not received payment shall not be taken by creditors of the vendee for their debts.[41] The right can be asserted only against one who is insolvent or bankrupt, and of whose condition the vendor did not know at the time of the sale.[42] To exercise this right it is simply necessary to notify the carrier, forbidding delivery or telling him to hold the goods subject to vendor's orders,[43] but the right may be exercised by a possessory action or bill in equity.[44] To make the notice effective, it must be brought to the person in the immediate custody of the goods in time to prevent delivery.[45] The agent of a vendor has authority to stop the goods in transitu, whether a general agent or a special agent for the purpose.[46] A consignor who is not the vendor has not the right to stop the goods.[47] If the bill of lading representing the goods has been transferred to a bona fide purchaser, the right of stoppage in transitu is defeated,[48] but it is not defeated by attachment by the consignee's creditors.[49] The right may be asserted as long as the goods are in the hands of the carrier, whether as a carrier or warehouseman, or in the possession of any middleman delivering to the consignee or his agent.[50] When the vendor

Lickbarrow v. Mason, 2 T. R. 63; Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26 and note; Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. and note; Stiles v. Howland, 32 N. Y. 309.

[41] Burghall v. Howard, 1 H. Bl. 365n; Snee v. Prescott, 1 Atk. 245.

[42] O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284; Fenkhausen v. Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am St. 919.

[43] Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84; Allen v. Maine &c. R. Co., 79 Maine 327, 9 Atl. 895, 1 Am. St. 310; Reynolds v. Boston & M. R. Co., 43 N. H. 580.

[44] Schotsmans v. Lancashire &c. R. Co., L. R. 1 Eq. 349, L. R. 2 Ch. App. 332; Ford v. Sprowle, 2 A. K. Marsh. (Ky.) 528, 12 Am. Dec. 439; Hause v. Judson, 4 Dana (Ky.) 7, 29 Am. Dec. 377n.

[45] Whitehead v. Anderson, 9 M. & W. 518; Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

[46] Feise v. Wray, 3 East 93; Reynolds v. Boston &c. R. Co., 43 N. H. 580; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

[47] Memphis & L. R. R. Co. v. Freed, 38 Ark. 614; Eaton v. Cook, 32 Vt. 58.

[48] Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861.

[49] Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. 114 and note; Farrell v. Richmond & D. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647n, 11 Am. St. 760.

[50] Bethell v. Clark, 20 Q. B. Div. 615; Lyons v. Hoffnung, 15 App. Cas. 39; Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26; Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; Wheeling & L. E. R. Co. v. Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. 435; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. 796.

has made a demand upon the carrier for the goods, or served notice of stoppage in transitu, or asserted his claim, he is considered constructively in possession of the goods.[51] If the buyer is in fact solvent at the time the vendor attempts to stop the goods, the duty of the carrier is not to deliver them up, but to carry them to their destination, and he is liable if he delivers them up,[52] but if insolvent and he delivers them to the consignee after notice he is liable to the vendor.[53] If the carrier wrongfully delivers the goods after a notice of stoppage in transitu, he is liable for the full value of them, stipulation in the bill of lading as to agreed valuation notwithstanding.[54] In order to protect himself, the carrier may require a reasonable time to investigate whether the buyer is insolvent in doubtful cases, and if unable to satisfy himself may resort to the courts to have the question of the right of possession of the goods determined.[55] One who is not a party to the contract of shipment, neither vendor nor consignee, cannot hold the carrier for failure to stop goods in transitu at his request.[56]

§ 246. **Receipt for delivery.**—The carrier has a right to demand a receipt as written evidence upon the delivery of the goods, and may be excused for failure to deliver by the consignee's refusal to give a receipt on request.[57] He may, as a condition of the delivery of a part of the goods, demand a receipt for the whole, if the owner desires to remove them in separate parcels and at different times.[58] He may require the production

[51] Litt v. Cowley, 7 Taunt. 169; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

[52] Hutchinson Carriers (3d. ed.), § 773; The Tigress, 32 L. J. Adm. 97; The Vidette, 34 Fed. 396; The E. H. Pray, 27 Fed. 474.

[53] Allen v. Maine Cent. R. Co., 79 Maine 327, 9 Atl. 895, 1 Am. St. 310; Bloomingdale v. Memphis &c. R. Co., 6 Lea (Tenn.) 616; Poole v. Houston &c. R. Co., 58 Tex. 134.

[54] Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

[55] See cases cited in last note 31, ante.

[56] Switzler v. Northern Pac. R. Co., 45 Wash. 221, 88 Pac. 137, 12 L. R. A. (N. S.) 254n, 122 Am. St. 892, 13 Am. & Eng. Ann. Cas. 357 and note.

[57] The Ethel, 59 Fed. 473; Bass v. Glover, 63 Ga. 745; Skinner v. Chicago &c. R. Co., 12 Iowa 191; Ayres v. Morris & Essex R. Co., 5 Dutch. (N. J.) 393, 80 Am. Dec. 215.

[58] Ayres v. Morris & Essex R. Co., 5 Dutch. (N. J.) 393, 80 Am. Dec. 215.

of the bill of lading before delivery,[59] but not under all circumstances its surrender,[60] and may waive the production by refusing to deliver for some other reason than nonproduction.[61]

§ 247. **Delivery to connecting carrier, and liability of connecting carrier—In general.**—Though a carrier may contract for the carriage of goods beyond his own line, he is not bound so to do,[62] and the general rule is that when he accepts goods to be transported beyond his destination, his liability as carrier terminates when he has delivered them to the next succeeding carrier.[63] But if he has contracted for the through carriage of the goods, he is liable for their safety until the final destination is reached,[64] and succeeding carriers become merely his agents.[65] The English rule, followed in several of our states, holds that when the carrier accepts for carriage goods directed to a destination beyond his own, he assumes, merely by accepting them, the contract to carry them to the place to which they are directed, and no express contract is necessary to hold him to such liability, but the contract to carry through is implied from the acceptance.[66] The so-called American rule is that, in the absence of a special contract, the carrier accepting goods is bound only to carry them over his own line and deliver them to the connecting carrier, no contract to carry through being implied from the acceptance of

[59] See cases cited under last note 56. See first note 22, ante.

[60] Gulf &c. R. Co. v. McCown (Tex. Civ. App.), 25 S. W. 435; Dwyer v. Gulf &c. R. Co., 69 Tex. 707, 7 S. W. 504.

[61] Clegg v. Southern R. Co., 135 N. Car. 148, 47 S. E. 667, 65 L. R. A. 717.

[62] Hutchinson Carriers (3d ed.), § 240; Seasongood v. Tennessee &c. Transp. Co., 21 Ky. L. 1142, 54 S. W. 193, 49 L. R. A. 270; cases cited in note, 31 L. R. A. (N. S.) 3.

[63] Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481, 16 Am. & Eng. R. Cas. (N. S.) 201; Roy v. Chesapeake & O. R. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A. (N. S.) 1, and very complete note on liability of connecting carrier for loss beyond its own line.

[64] Hutchinson Carriers (3d ed.), § 226; Chicago, I. & C. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Texas &c. R. Co. v. Reiss, 183 U. S. 621, 46 L. ed. 358, 22 Sup. Ct. 253.

[65] Virginia Coal & Iron Co. v. Louisville & N. R. Co., 98 Va. 776, 37 S. E. 310.

[66] Muschamp v. Lancaster &c. R. Co., 8 M. & W. 421; Willy v. West Cornnall R. Co., 2 H. & N. 703; Grant v. Northern Pac. R. Co., 24 Can. Sup. Ct. 546; Southern R. Co. v. Levy, 144 Ala. 614, 39 So. 95; Kansas City, F. S. & M. R. Co. v. Washington, 74 Ark. 9, 85 S. W. 406, 69 L. R. A. 65, 109 Am. St. 61; Atlantic Coast Line R. Co. v. Henderson, 131 Ga. 75, 61 S. E. 1111; Illinois Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 1041n; Carter v.

goods billed to a destination beyond his own.[67] The carrier may by special contract exclude liability beyond the terminus of his route.[68] By the federal statute known as the Carmack amendment to the Hepburn Act, a carrier accepting goods for interstate shipment is liable to the holder of the bill of lading for damages anywhere en route,[69] and some of the states have similar statutes applying to shipments within the state.[70]

§ 248. Who is a connecting carrier.—According to the definition quoted in Hutchinson on Carriers and Elliott on Railroads, a connecting carrier is "one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. It becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate

Chicago, M. & St. P. R. Co., 146 Iowa 201, 125 N. W. 94; East Tenn. V. & G. R. R. Co. v. Rogers, 6 Heisk. (Tenn.) 143, 19 Am. Rep. 589; Florida Cent. & Peninsula R. Co. v. United States, 43 Ct. Cl. (U. S.) 572; Windmiller v. Northern Pac. R. Co., 52 Wash. 613, 101 Pac. 225.

[67] Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468; Chicago, I. & L. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Missouri Pac. R. Co. v. Houston, 10 Kans. App. 356, 59 Pac. 688; Illinois Cent. R. Co. v. Curry, 127 Ky. 643, 106 S. W. 294; Vincent v. Yazoo &c. R. Co., 114 La. 1021, 38 So. 816; Colbath v. Bangor &c. R. Co., 105 Maine 379, 74 Atl. 918, 134 Am. St. 569; Hoffman v. Cumberland &c. R. Co., 85 Md. 391, 37 Atl. 214; Pendergast v. Adams Exp. Co., 101 Mass. 120; Rickerson Roller Mills Co. v. Grand Rapids &c. R. Co., 67 Mich. 110, 34 N. W. 269; Lawrence v. Winona &c. R. Co., 15 Minn. 390 (Gil. 313), 2 Am. Rep. 130; Lowenburg v. Jones, 56 Miss. 688, 31 Am. Rep. 379; Connolly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 S. W. 233; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394; Watson v. Atlantic Coast Line R. Co., 145 N. Car. 236, 59 S. E. 55; Taffe v. Oregon R. Co., 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187; Clyde v. Hubbard, 88 Pa. 358; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46; Galveston &c. R. Co. v. Noelke (Tex. Civ. App.), 110 S. W. 82; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Farmers' &c. Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; McConnell v. Norfolk &c. R. Co., 86 Va. 248, 9 S. E. 1006; Roy v. Chesapeake & O. R. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A. (N. S.) 1, and note citing many other cases on both sides.

[68] Hutchinson Carriers 3d ed.), § 233, and cases cited; note, 31 L. R. A. (N. S.) 69, and cases cited; Fremont &c. R. Co. v. New York, C. & St. L. R. Co., 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; Nashville, C. & St. L. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 27 L. ed. 325.

[69] Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7 and note.

[70] For review of cases involving statutes as to the liability of the first or connecting carrier, see note 31 L. R. A. (N. S.) 26-28, 52-3, 91, 99. Marshall &c. Grain Co. v. Kansas City R. Co., 176 Mo. 480, 75 S. W. 638, 98 Am. St. 508.

destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes the agent of the shipper for carrying them farther."[71] A transfer company is not held to be a connecting carrier, but instead, the agent of the company employing it to transfer the goods to a connecting carrier,[72] and so the transfer company employed by the last carrier to deliver goods is not a connecting carrier.[73] The connecting carrier's liability begins with the actual or constructive delivery to it.[74] It is held to the same duty to receive goods from a prior carrier that it owes to any other shipper, or to the public at large,[75] but it is not obliged to receive goods from a prior carrier unless they are offered in a condition fit for further transportation.[76]

§ 249. Contract for through carriage.—If the contract is express for through carriage, there is, of course, little difficulty in fixing its terms, but such a contract must be clear and unambiguous in order to bind the carrier.[77] It often becomes a question of fact to be ascertained from circumstances whether there was an implied contract for through carriage, and, in such a case, evidence may be introduced that the goods were marked to be carried through, that a through rate was paid, and that there was an agreement for them to be carried through in a certain car, that the usage was to carry goods through, and many other similar facts.[78] It may be shown from the stipulations of the

[71] Hutchinson Carriers (3d ed.), § 247; Elliott R. R. (2d ed.), § 1442; Nanson v. Jacob, 12 Mo. App. 125.

[72] Alabama, G. S. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Western &c. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Texas & P. R. Co. v. Scoggin, 40 Tex. Civ. App. 526, 90 S W. 521.

[73] Roach v. Canadian Pac. R. Co., 1 Manitoba 158; Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. 531.

[74] Selma & Meridian R. Co. v. Butts, 43 Ala. 385, 94 Am. Dec. 694; Petersen v. Case, 21 Fed. 885, 18 Am. & Eng. R. Cas. 578; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367, 18 Am. & Eng. R. Cas. 574; Sprague v. New York Cent. R. Co., 52 N. Y. 637; St. Louis Ins. Co. v. St. Louis, V. T. R. Co., 104 U. S. 146, 26 Fed. 679.

[75] Elliott R. R. (2d ed.), § 1443a; Hall v. Wabash &c. R. Co., 80 Mo. App. 463; Ft. Worth &c. R. Co. v. Masterson, 95 Tex. 262, 66 S. W. 833.

[76] Buston v. Pennsylvania R. Co., 116 Fed. 235.

[77] Taylor v. Maine Cent. R. Co., 87 Maine 299, 32 Atl. 905; Myrick v. Michigan &c. R. Co., 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. 425.

[78] Hutchinson Carriers (3d ed.), § 238; Falvey v. Georgia R. Co., 76

bill of lading that the car was received subject to the company's liability as a common carrier in the various states through which it was to pass,[79] that the carrier had the right to select the connecting carriers, and had an arrangement by which a through rate was agreed upon with the other carriers, in which all shared,[80] that the contract was that the goods were to be transported to the destination, where the American rule holds.[81] The payment of a through rate,[82] or the giving of a through waybill,[83] while evidence of a through contract, are not conclusive. Under a contract for through carriage, the carrier may contract for such exemptions from liability as he could were the carriage entirely over his own lines, and no more; and such contract will enure to the benefit of all succeeding carriers, if so stipulated.[84] It has been held that the following indicated an express contract to carry through: a receipt for goods marked for a point beyond the carrier's line, which leaves the blank for destination unfilled;[85] an agreement to forward to final destination, for if the actual

Ga. 597, 2 Am. St. 58; Hill M. Co. v. Boston & L. R. R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Berg v. Steamship Co., 5 Daly (N. Y.) 394; Root v. Great Western R. Co., 45 N. Y. 524; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; International & G. N. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545n; Evansville &c R. Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594, 22 L. ed. 724. See cases cited in note, 31 L. R. A. (N. S.) 14 et seq.

[79] Johnson v. Toledo, S. & C. R. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. 464.

[80] Eckles v. Missouri Pac. R. Co., 112 Mo. App. 240, 87 S. W. 99.

[81] Colfax Mt. Fruit Co. v. Southern Pac. R. Co., 118 Cal. 648, 46 Pac. 668, 50 Pac. 775, 40 L. R. A. 78; Ireland v. Mobile R. Co., 105 Ky. 400, 49 S. W. 188, 453, 20 Ky. L. 1586.

[82] Peruna Co. v. Dickson, 31 Ind. App. 451, 67 N. E. 538; Taylor v. Maine Cent. R. Co., 87 Maine 299, 32 Atl. 905; Eckles v. Missouri Pac. R. Co., 112 Mo. App 240, 87 S. W. 99; Chouteaux v. Leech, 18 Pa. 224, 57 Am. Dec. 602; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827, 49 How. Prac. (N. Y.) 84; Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; Sumner v. Walker, 30 Fed. 261; Fremont, E. & M. V. R. Co. v. New York &c. R. Co., 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; McKay v. New York &c. R. Co., 50 Hun (N. Y.) 563, 20 N. Y. St. 816, 3 N. Y. S. 708; Myrich v. Michigan &c. R. Co., 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. 425.

[83] Falvey v. Georgia R. Co., 76 Ga. 597, 2 Am. St. 58; Goldsmith v. Chicago &c. R. Co., 12 Mo. App. 479; Miller Grain &c. Co. v. Union P. R. Co., 138 Mo. 658, 40 S. W. 894; St. Louis Ins. Co. v. St. Louis &c. R. Co., 104 U. S. 146, 26 L. ed. 679.

[84] Elliott R. R. (2d ed.), § 1446; Mears v. New York &c. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. 192; Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. 315; Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. 856.

[85] Union Pac. R. Co. v. Johnson, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. 540; Cutts v. Brainard, 42 Vt. 566, 1 Am. Rep. 353.

contract is to carry the goods through, it is immaterial that the carrier in his receipt has made use of the words "to forward" or "to be forwarded" as describing the contract, and the real agreement may be shown;[86] stipulations binding connecting lines, and applying limitations to connecting lines;[87] shipment on one line with the privilege of changing the destination to a point beyond;[88] and a contract to deliver at a point beyond.[89] The following are held to negative a through contract: a stipulation for delivery at the first carrier's terminus or junction point;[90] an agreement to forward to the point nearest the destination reached by the carrier's line;[91] an agreement to carry to the destination if on the line, otherwise to deliver to a connecting carrier;[92] an agreement to deliver to the consignee or the next connecting carrier;[93] or an agreement limiting liability to the carrier's own line.[94]

§ 250. Authority to make through contract.—Under a contract for through carriage, the carrier may make such exemptions from liability as he could were the carriage entirely over his own lines, and no more, and such contract will inure to the

[86] Colfax Mt. Fruit Co. v. Southern Pac. R. Co., 118 Cal. 648, 46 Pac. 668, 50 Pac. 775, 40 L. R. A. 78; Davis v. Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Eckles v. Missouri Pac. R. Co., 112 Mo. App. 240, 87 S. W. 99; East Tennessee &c. R. Co. v. Rogers, 6 Heisk. (Tenn.) 143, 19 Am. Rep. 589; Cutts v. Brainard, 42 Vt. 566, 1 Am. Rep. 353.

[87] Missouri Pac. R. Co. v. Ryan, 2 Willson (Tex. App. Civ. Cas.) 430.

[88] White v. Missouri Pac. R. Co., 19 Mo. App. 400; Texas &c. R. Co. v. Gallagher (Tex. Civ. App.), 64 S. W. 809.

[89] Bryan v. Memphis &c. R. Co., 11 Bush (Ky.) 597; Blackmer &c. Co. v. Mobile &c. R. Co., 137 Mo. App. 133, 479, 119 S. W. 1, 13; Condict v. Grand Trunk R. Co., 54 N. Y. 500, affg. 4 Lans. (N. Y.) 106; Kyle v. Laurens R. Co, 10 Rich. L. (S. Car.) 382, 70 Am. Dec. 231.

[90] Rome R. Co. v. Sullivan, 25 Ga. 228; Fremont, E. & M. V. R. Co. v. New York &c R. Co., 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; Cincinnati, Hamilton &c. R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Cases cited 31 L. R. A. (N. S.) pp. 56-57.

[91] Pendergast v. Adams Exp. Co., 101 Mass. 120; American Exp. Co. v. Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 268.

[92] Pennsylvania Co. v. Dickson, 31 Ind. App. 451, 67 N. E. 538; Skinner v. Hall, 60 Maine 477; McEacheran v. Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612; Glazer v. Old Dominion S. S. Co., 103 N. Y. S. 112.

[93] Atchison, T. & S. F. R. Co. v. Richardson, 53 Kans. 157, 35 Pac. 1114; Schneider v. Evans, 25 Wis. 241, 3 Am. Rep. 56.

[94] Mulligan v. Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514; Ortt v. Minneapolis &c. R. Co., 36 Minn. 396, 31 N. W. 519; McCann v. Eddy, 133 Mo. 59, 33 S. W. 71, affd. 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. 755, 35 L. R. A. 110; Keller v. Baltimore & Ohio R. Co., 196 Pa. 57, 46 Atl. 261.

benefit of all succeeding carriers, if so stipulated,[95] but where a carrier cannot contract against the consequences of his own negligence, neither can he contract against the negligence of a connecting carrier.[96] While a general agent may bind the carrier by a contract for through carriage,[97] it is held that authority in a local freight agent or station agent to make a through contract will not be implied,[98] but that a usage for him to receive goods for through carriage may be shown and will bind his principal.[99] In the later cases, it is held that it is not beyond the powers of an incorporated carrying company which receives all its powers from a charter to make contracts for through carriage, even though by the terms of its incorporation it is limited to routes between certain points.[1] Unless a custom, course of dealing or agreement is shown, the initial carrier has no authority to make a contract which will bind the connecting carrier,[2] but if such connecting carrier accepts the goods under the contract of the first carrier, it is held to have adopted and ratified it.[3]

§ 251. **Which carrier is liable to consignee.**—The carrier whose default has caused loss is liable to the consignee in all states except Georgia.[4] If the first carrier has contracted for through transportation, or is by statute made liable for through transportation, it is liable for loss occasioned by any connecting

[95] See citations under note 84.

[96] Hutchinson Carriers (3d ed.), § 240; Halliday v. St. Louis &c. R. Co., 74 Mo. 159, 41 Am. Rep. 309; Cincinnati, Hamilton & Dayton &c. R. Co. v. Pontius, 190 Ohio St. 221, 2 Am. Rep. 391; Galveston &c. R. Co. v. Allison, 59 Tex. 193.

[97] Loomis v. Wabash &c. R. Co., 17 Mo. App. 340; Baltimore & P. Steamboat Co. v. Brown, 54 Pa. 77; Northern P. R. Co. v. American T. Co., 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. 84.

[98] McLagan v. Chicago &c. R. Co., 116 Iowa 183, 89 N. W. 233; Hoffman v. Cumberland V. R. Co., 85 Md. 391, 37 Atl. 214; Burroughs v. Norwich & W. R. Co., 100 Mass. 26, 1 Am. Rep. 78; Roy v Chesapeake &c. R. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A. (N. S.) 1.

[99] Perkins v. Portland &c. R. Co., 47 Maine 573, 74 Am. Dec. 507; Faulkner v. Chicago, R. I. &c. R. Co., 99 Mo. App. 421, 73 S. W. 927; Ogdensburg, L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827.

[1] Hill Mfg. Co. v. Boston & L. R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Swift v. Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583; Chesapeake & O. R. R. Co. v. Howard, 178 U. S. 153, 44 L. ed. 1015, 20 Sup Ct. 880.

[2] Hutchinson Carriers (2d ed.), § 248; Texas &c. R. Co. v Scoggin, 40 Tex. Civ. App. 526, 90 S. W. 521.

[3] Houston &c. R. Co. v. Everett, 99 Tex. 269, 89 S. W. 761.

[4] Elliott R. R. (2d ed.), §§ 1442, 1448; Cavallarro v. Texas & P. R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. 94; Ill. Cent. R. Co. v. Cowles, 32 Ill. 116, 117; International &c. R. Co.

carrier.[5] So where the loss has occurred on the connecting carrier's line, both it and the first carrier may be liable to the consignee. The presumption in case of damage or loss to goods is that each carrier received the goods in good order,[6] and that the last carrier is in fault, but this obtains only in the absence of proof.[7] Unless there is a partnership, express or implied, between the carriers, a connecting carrier cannot be held for the default of the initial or other connecting carriers,[8] but, if a partnership exists, they are jointly and severally liable for loss,[9] and if there is such an agreement, usage or custom existing between them that one can be held to be the actual or implied agent of the other, they may be jointly liable.[10] If they participate in the profits of the carriage in certain proportions or in its net receipts, they are held as partners;[11] if they employ a joint agent, they are held liable as joint principals for his defaults, but are not liable for the acts of each other.[12] But a contract by such joint agent for through transportation as a joint enterprise may make them jointly liable for

v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545.

[5] See cases in notes 64, 65, 69 (last). St. Louis &c. R. Co. v. Wallace, 90 Ark. 138, 118 S. W. 412, 22 L. R. A. (N. S.) 379 and note.

[6] St. Louis &c. R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21, 3 Am. & Eng. Ann. Cas. 583; Beard v. Illinois Central R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381; Colbath v. Bangor &c. R. Co., 105 Maine 379, 74 Atl. 918, 134 Am. St. 569; Beede v. Wisconsin &c. R. Co., 90 Minn. 36, 95 N. W. 454, 101 Am. St. 390; Texas & P. R. Co. v. Adams, 78 Tex 372, 14 S. W. 666, 22 Am. St. 56 and note. Note 101 Am. St. 393, 4, 5.

[7] St. Louis &c. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317n, 118 Am. St. 58. If the suit is against the first carrier and it is not liable for through transportation, the burden is on the plaintiff to show the injury occurred on its line; if against the last carrier, the burden is on the carrier to show that the injury did not occur on its line. St. Louis &c. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. 75.

[8] Montgomery & W. P. R. Co. v. Moore, 51 Ala. 394; Berry Coal & Coke Co. v. Chicago &c. R. Co., 116 Mo. App. 214, 92 S. W. 714; Knott v. Raleigh &c. R. Co., 98 N. Car. 73, 3 S. E. 735, 2 Am. St 327; Chesapeake & Ohio R. Co. v. Stock, 104 Va. 97, 51 S. E. 161.

[9] Weyland v. Elkins, Holt N. P. 227; Cobb v. Abbot, 14 Pick. (Mass.) 289; R. E. Funsten Dried Fruit &c. Co. v. Toledo &c. R. Co. (Mo. App.), 143 S. W. 839; Rocky Mt. Mills v. Wilmington &c. R. Co., 119 N. Car. 693, 25 S. E. 854, 56 Am. St. 682; Carter v. Peck, 4 Sneed (Tenn.) 203.

[10] Hutchinson Carriers (3d ed.), § 263.

[11] Hutchinson Carriers (3d. ed.), § 263; Peterson v Chicago &c. R. Co., 80 Iowa 92, 45 N. W. 573; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Hart v. Rensselaer &c. R. Co., 8 N. Y. (4 Seldon) 37, 59 Am. Dec. 447.

[12] Elliott R. R. (2d ed.), § 1447; Cobb v. Abbot, 14 Pick. (Mass.) 289; Gulf &c. R. Co. v. Baird, 75 Tex. 256, 12 S. W. 530.

the defaults of each other in carrying out the contract.[13] Carriers may be liable to the owner of goods as partners, and not be liable as such between themselves; so in certain cases a carrier may be liable to the consignee for loss or damage, and have an action over against the connecting carrier whose default, in fact, caused the injury, as a remedy, as, for instance, when the first carrier has made a through contract, and the negligence or fault of a succeeding carrier has caused injury to the goods.[14] A carrier has no right of action on a contract which an initial carrier has made with a shipper whereby it agreed to deliver the goods to the other carrier for further transportation, and fails to make such delivery.[15] The preceding carrier has usually the right to contract with a succeeding one as the owner of the goods would, and stands in the owner's place,[16] but usage or private arrangements between them may greatly change their relation as between themselves and may put the first carrier in a situation much different from that in which the shipper would stand, although these arrangements or usages cannot affect the shipper's rights.[17]

§ 252. Compensation of connecting carriers.—Connecting carriers which receive the goods in good faith in the ordinary and usual course of business between connecting carriers, without notice of any special direction by the consignor, or limitation upon the apparent authority of the carrier, are not bound by any contract between the consignor and the first carrier for reduced freight, or for carriage by a certain route, but are entitled to reasonable charges for their services, and to a lien for their own

[13] Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 95n, 109 Am. St. 830; Hart v. Rensselaer &c. R. Co., 8 N. Y. 37, 59 Am. Dec. 447; Swift v. Pac. Mail &c. Co., 106 N. Y. 206, 12 N. E. 283; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469.

[14] Southern R. Co. v. Waters Co., 125 Ga. 520, 54 S. E. 620; Vermont & Massachusetts R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785; Missouri Pacific R. Co. v. Twiss, 35 Nebr. 267, 53 N. W. 76, 37 Am. St. 437.

[15] St. Louis &c. R. Co. v. Missouri Pac. R. Co., 35 Mo. App. 272.

[16] Squire v. New York Central R. Co., 98 Mass. 239, 93 Am. Dec. 162; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; York Co. v. Ill. Central R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170.

[17] Wallace v. Rosenthal, 40 Ga. 410; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367.

charges, and for freight lawfully paid by them to prior connecting carriers.[18] If the initial carrier has broken its contract with the shipper in sending the goods by a certain carrier, or in subjecting him to increased liability for freight charges, the remedy is an action against such initial carrier, and the connecting carrier cannot be held,[19] unless it accepted with notice of the contract, or was in collusion with the first carrier to defraud the shipper,[20] or could be held as an agent or partner of the first carrier.[21] The intermediate carrier is held by law to the duty not only to carry the goods over its own line, but also to use reasonable diligence to secure further transportation by tendering the goods to the connecting carrier,[22] and if the latter refuses to accept, the intermediate carrier must give notice to the owner, and then, upon storing the goods, he becomes liable only as a warehouseman.[23]

§ 253. Delivery to connecting carriers.—Which one of two connecting carriers is liable for loss to the goods often depends upon whether there has been a delivery by one to the other, that is, in cases where there is no joint liability. The first carrier, upon carrying the goods to the point of connection, must use reasonable diligence to deliver the goods to the succeeding

[18] Elliott R. R. (2d ed.), § 1451, and cases cited; Goodin v. Southern R. Co., 6 L. R. A. (N. S.) 1054 and note, 125 Ga. 630, 54 S. E. 720, 5 Am. & Eng. Ann. Cas. 73; Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247; Crossan v. New York &c. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766 and note, 14 Am. St. 408; Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228 and note; Gulf C. & S. F. R. Co. v. Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. 926.

[19] St. Louis, I. M. & S. R. Co. v. Lear, 54 Ark. 399, 15 S. W. 1030, 55 Am. & Eng. R. Cas. 414; Georgia R. & Banking Co. v. Murrah, 85 Ga. 343, 11 S. E. 779; Mt. Pleasant Mfg. Co. v. Cape Fear &c. R. Co., 106 N. Car. 207, 10 S. E. 1046, 42 Am. & Eng. R. Cas. 498.

[20] Denver & Rio Grande R. Co. v. Hill, 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376, 40 Am. & Eng. R. Cas. 145; Robinson v. Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54; Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33.

[21] Evansville &c. R. Co. v. Marsh, 57 Ind. 505; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90; Harp v. Grand Era, 1 Woods (U. S.) 184, Fed. Cas. No. 6084.

[22] Elliott R. R. (2d ed.), § 1449; Alabama G. S. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Irish v. Milwaukee & St. P. R. Co., 19 Minn. 376, (Gil 323) 18 Am. Rep. 340; Wehmann v. Minneapolis St. P. & S. S. M. R. Co., 58 Minn. 22, 59 N. W. 546.

[23] Buston v. Pennsylvania R. Co., 119 Fed. 808, 56 C. C. A. 320; Fisher v. Boston & M. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Colbath v. Bangor & A. R. Co., 105 Maine 379, 74 Atl. 918, 134 Am. St. 569; Andon v. Marquette, H. & O. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367.

carrier, must at least make a tender of delivery, and be in readiness to deliver in accordance with his tender.[24] It is not enough, it is held, that the second carrier is simply informed of the goods, and, it seems, that he will refuse to accept them, but actual tender must be made.[25] The question of what is reasonable diligence depends upon the circumstances.[26] The consignor of goods shipped by a route requiring transportation over two connecting lines may decline to ship farther when the goods are delivered at the connecting point, and, upon payment of the first carrier's charge, may demand redelivery.[27] If a particular carrier has been designated to whom the goods must be delivered as succeeding carrier, the preceding carrier is liable as for conversion if he fails to deliver, unless the second carrier fails to accept,[28] and if he delivers to another carrier than the one selected, this act makes the first carrier an insurer of the safe arrival of the goods at their destination.[29] If there is only one connecting carrier, the presumption is that the goods are to be delivered to him; if there are more than one, and no one has been specified, the goods should be delivered to be forwarded in the usual way.[30] If the selected carrier cannot take the goods, in the case of perishable goods, the first carrier must usually send them forward by the best means possible.[31] But if it is possible to communicate with the shipper for further instructions, such is the carrier's duty.[32] It is the first carrier's duty to transmit to the succeeding carrier the instructions as to the destination and final disposition and delivery of the goods and if injury results to the

[24] Grand Rapids & I. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. 385; Regan v. Grand Trunk R. Co., 61 N. H. 579; Whitworth v. Erie R. Co., 87 N. Y. 413.

[25] Grand Rapids & I. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. 385.

[26] Rock Island & Peoria R. Co. v. Potter, 36 Ill. App. 590.

[27] Wente v. Chicago &c. R. Co., 79 Nebr. 179, 115 N. W. 859, 15 L. R. A. (N. S.) 756 and note.

[28] Georgia Pac. R. Co. v. Cole & Co., 68 Ga. 623; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394.

[29] Brown v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

[30] Chicago, I & L. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; Texas & P. R. Co. v. Callender, 183 U. S. 632, 46 L. ed. 362, 22 Sup. Ct. 257.

[31] Regan v. Grank Trunk R. Co., 61 N. H. 579.

[32] Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Proctor v. Eastern R. Co., 105 Mass. 512; Shea v. Chicago, R. I. & P. Railway, 66 Minn. 102, 68 N. W. 608.

goods from his failure so to do, he is liable.[33] When the goods have been delivered to the second carrier, liability terminates on the part of the first unless the contract is for through carriage, or other circumstances import liability.[34] If the second carrier refuses to carry, and the preceding carrier has used due diligence, has stored the goods and communicated with the owner, his liability terminates.[35] As long as the first carrier allows the goods to remain upon his conveyances, awaiting the succeeding carrier, his liability is that of a common carrier, until, by some clear and unmistakable act, he changes his office from carrier to custodian.[36] Merely unloading the goods is not a delivery to the succeeding carrier.[37] Usage may control the manner of making a delivery to the succeeding carrier.[38] And between carriers, usage or custom of the trade, or an established course of dealing may give rise to what is called constructive delivery, with no actual transfer of possession, but the shipper may look to the one in whose actual possession they were at the time of the loss,[39] and also to the one to whom they have been constructively delivered.[40] Property which has been stored in a warehouse by one connecting carrier while waiting a reasonable time for another carrier to take it is held under the carrier's liability, the goods being considered as in transportation, or awaiting transporta-

[33] Colfax Mountain Fruit Co. v. Southern Pac. R. Co., 118 Cal. 648, 46 Pac. 668, 50 Pac. 775, 40 L. R. A. 78; North v. Merchants' & Miners' Transp. Co., 146 Mass. 315, 15 N. E. 779; Richer v. Fargo, 77 App. Div. (N. Y.) 550, 78 N. Y. S. 1007.

[34] See cases cited in note 63 (last).

[35] Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Condon v. Marquette, H. &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; Lesinsky v. Great Western Despatch, 10 Mo. App. 134; Regan v. Grand Trunk R. Co., 61 N. H. 579; Whitworth v. Erie R. Co., 87 N. Y. 413.

[36] Bennitt v. Missouri Pac. R. Co., 46 Mo. App. 656.

[37] Gass v. New York &c. R. Co., 99 Mass. 220, 96 Am. Dec. 742; Irish v. Milwaukee & St. Paul R. Co., 19 Gil. (Minn.) 323, 18 Am. Rep. 340; Texas &c. R. Co. v. Reiss, 183 U. S. 621, 46 L. ed. 358, 22 Sup. Ct. 253; Michigan Cent. R. Co. v. Mineral Springs Co., 16 Wall. (U. S.) 318, 21 L. ed. 297.

[38] Gibson v. Culver, 17 Wend. (N. Y.) 305; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Texas &c. R. Co. v. Hassell, 23 Tex. Civ. App. 681, 58 S. W. 54.

[39] Louisville & N. R. Co. v. Farmers' & Drovers' &c. Firm, 107 Ky. 53, 53 S. W. 972; Condon v. Marquette R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; McDonald v. The Western R. Corp., 34 N. Y. 497; Conkey v. Milwaukee & St. Paul R. Co., 31 Wis. 619.

[40] Ætna Ins. Co. v. Wheeler, 49 N. Y. 616.

tion.[41] Each carrier who takes goods, whether from the original shipper or from the preceding carrier, which are to be carried beyond its destination, becomes as to the forwarding of the goods the owner's agent.[42]

[41] McDonald v. Western R. Corp., 34 N. Y. 497; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Lewis v. Chesapeake & Ohio Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. 816.

[42] See cases cited under note 16, § 251.

CHAPTER XV.

CARRIERS OF LIVE STOCK.

§ 254. Carriers of live stock in general.
255. Duty to carry.
256. Place of reception.
257. Carrier's duty as to accommodations.
258. Loading and unloading.
259. Care of the stock in transit.
§ 260. Liability for loss or delay.
261. Special contract and limitation of liability.
262. Statutory regulation.
263. Termination of relation and delivery.
264. Delivery to connecting carrier.

§ 254. Carriers of live stock in general.—The general rules of law applicable to the carrier of goods are likewise applicable to the carrier of live stock, subject to certain modifications on account of the peculiar nature of the freight. As a rule, live stock is carried on a special contract, and not under the general duty as carrier. The endeavor in this chapter will be to set out the particulars, not already touched upon, in which the carrier of live stock differs from the carrier of goods. It has been set forth among the exceptions to the common carrier's liability implied by law as an insurer that he cannot be held for losses resulting from the inherent nature and propensities of animals. The general rule held in practically all the states is that the common carrier of goods who carries live stock is as to the latter also a common carrier, except that he is not an insurer for losses resulting from the inherent nature and propensities of animals.[1]

[1] Elliott R. R. (2d ed.), §§ 1545, 1546; Hutchinson Carriers (3d ed.), § 339; Summerlin v. Seaboard Air-line R. Co., 56 Fla. 687, 47 So. 557, 19 L. R. A. (N. S.) 191, 131 Am. St. 164; Central of Ga. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 697, 110 Am. St. 170; Kansas Pac. R. Co. v. Nichols, 9 Kans. 235, 12 Am. Rep. 494; Stiles v. Louisville &c. R. Co., 129 Ky. 175, 110 S. W. 820, 130 Am. St. 429, and see note 130 Am. St. 432, for a general collection of authorities on liability of a carrier for loss or injury to live stock; Clive v. Chicago, B. & Q. R. Co., 77 Nebr. 166, 108 N. W. 982, 124 Am. St. 837, 15 Am. & Eng. Ann. Cas. 33 and note; John Schroeder Lumber Co. v. Chicago & N. W. R. Co., 135 Wis. 575, 116 N. W. 179, 128 Am. St. 1039.

In Michigan it is held that a carrier of live stock is not a common carrier.[2]

§ 255. **Duty to carry.**—All carriers who hold themselves out as carriers of live stock and make such their business are ordinarily under a duty to accept such stock for carriage within reasonable regulations, and an action will lie for refusal without good excuse.[3] The carriage of live stock is practically confined to railroads on land and to steamboats and large sea-going vessels on water. There may be good reasons for refusal to carry live stock. Among them are the following: a railroad may refuse to take cattle to be transported into a county in which a license is required by law as a prerequisite, and the owner has not procured such license,[4] and may be justified in refusing to carry cattle so diseased as to injure others, or cattle the transportation of which is forbidden by a valid and constitutional statute,[5] though it is held no defense that transportation is forbidden by an unconstitutional statute.[6]

§ 256. **Place of reception.**—The carrier must make such provision at the place of loading as will enable it to properly receive and load the stock,[7] that is, he must furnish pens sufficient in number and size to care for the ordinary volume of such business or such volume as is reasonably to be anticipated;[8] and these pens should be safe and in a sanitary condition.[9] So a pen has been held unsafe for hogs which was built on a south slope, with no shade, shelter, or water, and an embankment on one side

[2] Heller v. Chicago &c. R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. 541 and note.

[3] Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776; see note 63 Am. St. 549, 550 et seq.; note 67 Am. Dec. 213.

[4] Williams v. Great Western R. Co., 52 L. T. 250, 49 J. P. 439.

Furley v. Chicago &c. R. Co., 90 Iowa 146, 57 N. W. 719, 23 L. R. A. 73; Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638, and note, 47 Am. St. 653, 61 Am. & Eng. R. Cas. 343 and note; Hannibal &c. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

[5] Chicago & Alton R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70.

[7] Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73; 11 Sup. Ct. 461; note, 130 Am. St. 448.

[8] Casey v. St. Louis Southwestern R. Co., 37 Tex. Civ. App. 49, 83 S. W. 20.

[9] St. Louis & S. F. R. Co. v. Beets, 75 Kans. 295, 89 Pac. 683, 10 L. R. A. (N. S.) 571 and note; Norfolk & W. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. 855. These pens should be reasonably safe for caretakers of the stock. At-

which cut off the breeze,[10] and where hogs were killed by lime wash, though left in the pens for disinfecting purposes by official order, the carrier was liable.[11]

§ 257. **Carrier's duty as to accommodations.**—The carrier must furnish cars reasonably safe and suitable for the transportation of stock of the kind which it undertakes to carry,[12] some authorities holding him liable to furnish cars absolutely safe.[13] At least, the quarters furnished must be strong enough to transport animals of ordinary unruliness, but not those of extraordinary viciousness of their kind, unless there is knowledge of such fact.[14] A sufficient amount of room for the number of animals should be given,[15] and where cattle are carried in a vessel, it is implied in the contract that there shall be sufficient ventilation in the compartments allotted them.[16] The carrier is liable for injuries caused by defective cars, stock pens, or appliances.[17]

§ 258. **Loading and unloading.**—What has been said in reference to the providing of proper pens for loading applies equally to the same facilities for unloading.[18] The duty to load and unload is primarily that of the carrier, but may become that of the shipper by special contract.[19] Where the shipper has assumed the duty, the carrier must furnish him proper facilities and opportunities to load and unload.[20] If the carrier loads and

chison, T. & S. F. R. Co. v. Allen, 75 Kans. 190, 88 Pac. 966, 10 L. R. A (N. S.) 576n.

[10] Lackland v. Chicago &c. R. Co., 101 Mo. App. 420, 74 S. W. 505.

[11] Shaw v. Great Southern R. Co., 8 L. R. Ir. 10.

[12] Betts v. Chicago, R. I. & P. R. Co., 92 Iowa 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. 558; Morrison v. Philips &c. Construction Co., 44 Wis. 405, 28 Am. Rep 599; John Schroeder Lumber Co. v. Chicago & N. W. R. Co., 135 Wis. 575, 116 N. W. 179, 128 Am. St. 1039.

[13] Smith v. New Haven &c. R. Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166.

[14] Betts v. Chicago, R. I. & P. R. Co., 92 Iowa 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. 558; Selby v. Wilmington & W. R. Co., 113 N. Car. 588, 18 S. E. 88; Wilson v. Hamilton, 4 Ohio St. 722.

[15] Kinnick v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772.

[16] The Alvah, 77 Fed. 315, 23 C. C. A. 181.

[17] Elliott R. R. (2d ed.), § 1551; Chesapeake & O. R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449. See cases cited ante, notes 9, 12, 13, 14. Note 130 Am. St. 446.

[18] See authorities cited in preceding sections.

[19] Southern &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Shureman v. Chicago, Burlington &c. R. Co., 88 Mo. App. 183.

[20] Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am.

unloads, he is liable for negligence,[21] and if either shipper or carrier assumes to load or unload when such is the duty of the other, he cannot hold the other for the result of his negligence in so doing.[22]

§ 259. **Care of the stock in transit.**—Where the shipper selects cars with knowledge of a defect, the general rule is that the carrier is not liable for injuries caused thereby,[23] especially where such is provided in the contract,[24] but there are many cases to the contrary.[25] The carrier must give the stock air, water, food as required, and rest if necessary, and provide suitable places for feeding and watering.[26] The carrier is liable for injury caused by his negligence in regard to the care of the stock.[27] Where hogs in transportation are crowded, and in danger of becoming overheated, it is the duty of the carrier to throw water

St. 55; Norfolk &c. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. 127; Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883. But where the shipper has agreed to load and unload, the carrier must show that injury in unloading was not caused by its negligence. Gilliland v. Southern R. Co., 85 S. Car. 26, 67 S. E. 20, 137 Am. St. 861.

[21] Mexican Nat. R. Co. v. Savage (Tex. Civ. App.), 41 S. W. 663.

[22] Burgher v. Chicago, R. I. &c. R. Co., 105 Iowa 335, 75 N. W. 192; Normile v. Oregon Nav. Co., 41 Ore. 177, 69 Pac. 928; San Antonio & A. P. R. Co. v. Dolan (Tex. Civ. App.), 85 S. W. 302.

[23] As where the shipper of horses selects an inadequately ventilated car, with knowledge. John Schroeder Lumber Co. v. Chicago &c. R. Co., 135 Wis. 575, 116 N. W. 179, 128 Am. St. 1039. See also, Coupland v. Housatonic &c. R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Harris v. Northern Ind. R. Co., 20 N. Y. 232.

[24] Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Kansas City, M. & B. R. Co. v. Holland, 68 Miss. 351, 8 So. 516; Wilson v. New York Central R. Co., 27 Hun (N. Y.) 149.

[25] Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Rhodes v. Louisville &c. R. Co., 9 Bush (Ky.) 688; Welsh v. Pittsburg, Ft. W. & C. R. Co., 10 Ohio St. 65, 75 Am. Dec. 490; Ogdensburg & Lake Champlain R. Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827. The stipulation in the shipping contract that the shipper accepts the cars and acknowledges them sufficient and suitable in every respect does not relieve the carrier from negligence in supplying unsuitable cars. Nevins v. Chicago, St. P. M. & O. R. Co., 124 Wis. 313, 102 N. W. 489, 109 Am. St. 935.

[26] Illinois Cent. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Chicago, B. & Q. R. Co. v. Williams, 61 Nebr. 608, 85 N. W. 832, 55 L. R. A. 289; Stiles v. Louisville & N. R. Co., 129 Ky. 175, 110 S. W. 820, 18 L. R. A. (N. S.) 86n, 130 Am. St. 429n; Gulf C. & S. F. R. Co. v. Wilhelm, 4 Willson Civ. Cas. (Tex. Civ. App.), § 485, 16 S. W. 109; Bosley v. Baltimore & O. R. Co., 54 W. Va. 563, 46 S. E. 613, 619, 66 L. R. A. 871; note 130 Am. St. 452. The carrier is liable for loss caused by his failure to unload hogs and give them rest and time to cool off, when necessary. St. Louis S. W. R. Co. v. Mitchell (Ark.), 142 S. W. 168, 37 L. R. A. (N. S.) 547.

[27] Elliott R. R. (2d ed.), § 1548; Indianapolis P. & C. R. Co. v. Allen, 31 Ind. 394; Moulton v. St. Paul &c.

over them in order to prevent it.[28] Where animals pile up, and might smother those underneath, the carrier is under a duty to give suitable attention to prevent this, either by unloading, or otherwise, and even if the shipper has overcrowded the cars, if the carrier has accepted the animals with knowledge of such fact, he must take care to prevent smothering and suffocation because of such condition.[29] But where the shipper overcrowded crates of fowls, and the cars were in proper condition, it was held that the loss by suffocation was caused by the negligence of the shipper in packing.[30] Where a hog was killed by being placed in a steam-heated car, and the carrier could by ordinary diligence have foreseen such result, he was held liable;[31] likewise where bedding was set fire negligently and the stock injured.[32] If the carrier has made provisions to protect the stock, sufficient under ordinary conditions, he is not liable for loss caused by unusual climatic conditions, as where animals contract pneumonia from an unusual drop in temperature,[33] and need use only ordinary care to protect them from freezing,[34] but is liable where he negligently allows animals to perish from cold.[35] The carrier is liable if he knowingly exposes the animals to disease in the course of transportation, as, for instance, where hogs shipped to a stock show contracted cholera while being transported over a railroad, where there was no necessity for exposing them to infection,[36] or if he unloads them in

R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; see cases cited in notes following.

[28] Illinois Cent. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Toledo, N. & W. R. Co. v. Thompson, 71 Ill. 434; Wallace v. Lake Shore &c. R. Co., 133 Mich. 633, 95 N. W. 750. This is not the duty of the shipper who accompanies the stock to feed, water, and care for them, but of the carrier alone. The shipper's duty is performed when he tells the carrier's agents the hogs need sprinkling, and the carrier cannot contract against negligence in performing this duty. Peck v. Chicago, Great Western R. Co., 138 Iowa 187, 115 N. W. 1113, 16 L. R. A. (N. S.) 883n, 128 Am. St. 185.

[29] Kinnick v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772.

[30] Cohn v. Platt, 48 Misc. (N. Y.) 378, 95 N. Y. S. 534. But where a carrier accepted a crate containing dogs insecurely crated, it was liable for the loss of one therefrom. Atlantic Coast &c. R. Co. v. Rice, 169 Ala. 265, 52 So. 918, Ann. Cas. 1912B. 389.

[31] United States Exp. Co. v. Burke, 94 Ill. App. 29; Burke v. United States Exp. Co., 87 Ill. App. 505.

[32] Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564.

[33] Louisville & N. R. Co. v. Warfield, 30 Ky. L. 352, 98 S. W. 313; Cohn v. Platt, 48 Misc. (N. Y.) 378, 95 N. Y. S. 534.

[34] Colsch v. Chicago, M. & St. P. R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C, 915 and note.

[35] Feinberg v. Delaware &c. R. Co., 52 N. J. L. 451, 20 Atl. 33.

[36] Council v. St. Louis & S. F. R. Co., 123 Mo. App. 432, 100 S. W. 57.

cattle pens where they contract Texas fever,[37] or infects them from cars[38] or from his yards.[39] If the carrier knows that animals are pregnant, or sick, or from facts in his possession a reasonable man would so conclude, he must give to such animals the treatment which their condition demands.[40] If he does not know the condition, he is liable for no more than ordinary care.[41] It was held that a carrier must set aside a car of frightened animals, if within reason, where the owners make the request, and the agents of the carrier know that the animals are in danger of being killed or hurt by being carried farther.[42] The carrier may so make up the train that he is liable for negligence in transporting live stock, as where a log on a flat car projected over, came in contact with a car in which horses were, and caused damage.[43] It is the carrier's duty to provide suitable places for feeding and watering the animals transported.

§ 260. Liability for loss or delay.—Summing up, the carrier is liable for loss caused by failure to observe the duties above mentioned, but is not liable for loss caused by inherent nature of the animals, or by the fault of the shipper,[44] or by an agency excepted by special contract.[45] He is liable for loss occasioned

[37] Baltimore & O. R. Co. v. Dever, 112 Md. 296, 75 Atl. 352, 21 Am. & Eng. Ann. Cas. 169.

[38] Illinois Cent. R. Co. v. Harris, 184 Ill. 57, 56 N. E. 316, 48 L. R. A. 175; St. Louis, I. M. & S. R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878.

[39] Dorr Cattle Co. v. Chicago &c. R. Co., 128 Iowa 359, 103 N. W. 1003.

[40] McCune v. Burlington &c. R. Co., 52 Iowa 600, 3 N. W. 615; Estill v. New York &c. R. Co., 41 Fed. 849, mod. 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. 445. But a railroad company which has taken a horse for transportation on a regular freight schedule is not liable for its loss because it refuses to attach the car to a passenger train or otherwise hasten the shipment, upon receiving notice that the animal is ill, where the train carrying it is substantially on schedule time, and there is no faster freight train to which it could be attached. Pine v. Chicago &c. R. Co. (Iowa), 133 N. W. 128, 39 L. R. A. (N. S.) 639 and note reviewing authorities as to care to be taken by carrier in case of loss threatened to live stock.

[41] Missouri Pac. R. Co. v. Fagan (Tex. Civ. App.), 27 S. W. 887.

[42] Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Johnson v. Alabama & V. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 534.

[43] Galveston H. & S. A. R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129.

[44] Pratt v. Ogdensburg &c. R. Co., 102 Mass. 557; Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Hutchinson v. Chicago, St. P. M. & O. R. Co., 37 Minn. 524, 35 N. W. 433; Newby v. Chicago &c. R. Co., 19 Mo. App. 391.

[45] See succeeding section. A provision in a contract for transportation of live stock, that the rules, regulations and conditions prescribed by the shipper shall be binding on the

by defective cars and appliances,[46] and for loss caused by the management of his vehicle. For instance, in the management of a train, sudden jerks and movements of the cars may occur which would not damage ordinary freight, but may injure animals by throwing them against each other, or throwing them down.[47] He is also liable for unreasonable delay in beginning the transportation.[48] In general, the liability for delay in transportation is that of any other carrier and he is bound to carry within a reasonable time,[49] but, in the case of delay of a carrier of live stock, the nature of the freight requires reasonable and suitable attention to their wants and safety.[50] A deviation from the agreed route or departure from the agreed method of transportation renders the carrier liable as an insurer and deprives him of the benefit of exemptions contained in the original contract.[51]

§ 261. Special contract and limitation of liability.—Ordinarily, stock shipped by rail is carried under a special contract by which the shipper undertakes the loading and unloading and the care of the stock on the way. Under such a contract the carrier is not liable for injuries caused by a failure to feed and water,[52] but is under a duty to furnish the shipper all reasonable opportunities to care for his stock, in the way of feed, water, and whatever else may be necessary for their proper transportation.[53]

carrier, and that the signing of the contract by the shipper shall be conclusive evidence of his agreement, is invalid. Houtz v. Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628n.

[46] See cases cited in note 17. As where a car was not reasonably safe for the transportation of horses without proper bedding, the carrier's duty was to furnish such bedding. Allen v. Chicago, B. & Q. R. Co., 82 Nebr. 726, 118 N. W. 655, 23 L. R. A. (N. S.) 278n.

[47] Chicago & N. W. R. Co. v. Calumet Stock Farm, 96 Ill. App. 337, affd. 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68; Chicago & Alton R. Co. v. Grimes, 71 Ill. App. 397; Bartelt v. Oregon R. & Nav. Co., 57 Wash. 16, 106 Pac. 487, 135 Am. St. 959.

[48] Cincinnati, I. St. L. & C. R. Co. v. Case, 122 Ind. 310, 23 N. E. 797, 42 Am. & Eng. R. Cas. 537; Philadelphia & Wilmington R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415.

[49] St. Louis, I. M. & S. R. Co. v. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. 99; St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. 75. See note 130 Am. St. 455.

[50] Chicago, B. & Q. R. Co. v. Slattery, 76 Nebr. 721, 107 N. W. 1045, 124 Am. St. 825.

[51] McKahan v. American Exp. Co., 209 Mass. 270, 95 N. E. 785, 35 L. R. A. (N. S.) 1046n, Ann. Cas. 1912B. 612 and note.

[52] Elliott R. R. (2d ed.), § 1553; Central R. Co. v. Bryant, 73 Ga. 722; Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 56 Atl. 129, 1 Am. & Eng. Ann. Cas. 156 and note; 56 Atl. 129, affd. 71 N. J. L. 339, 59 Atl. 1117.

[53] Wabash, St. L. & P. R. Co. v.

Nor is the carrier relieved from responsibility if the shipper who has expressly agreed to accompany the stock as caretaker fails to do so, and the company, with knowledge of his failure, proceeds under the contract.[54] Where the care of the stock is in the hands of the owner, or a caretaker appointed as his agent for the purpose, however, the burden of proof is upon him to show that any injury thereto was caused by negligence of the carrier, and not by his own.[55] The carrier of live stock needs no contract exemption from losses occasioned by the peculiar nature of animals,[56] and cannot by contract exempt himself from the consequences of his own negligence.[57] The general rules applying to the limitation of liability by contract in the carriage of goods apply equally to the carriage of live animals,[58] and in their discussion we considered many cases where live stock was transported.

§ 262. Statutory regulation.—In some states, statutes provide that stock carried by railroads shall not be confined for a longer time than a certain one designated, without unloading for water[59] and feed. There is a similar act of Congress in relation to the transportation of stock between states, that no railroad company whose road forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one state to another shall confine such stock in cars for more than twenty-eight consecutive hours, without unloading them for rest, water, and feeding, unless they are carried in cars in which they have proper food, water, and space and opportunity to rest,

Pratt, 15 Ill. App. 177; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Taylor, B. & H. R. Co. v. Montgomery, 4 Tex. App. (Civil Cas.) 401, 16 S. W. 178; Abrams v. Milwaukee, L. S. & W. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55, 61 Am. & Eng. R. Cas. 313.

[54] Chicago, B. & Q. R. Co. v. Slattery, 76 Nebr. 721, 107 N. W. 1045, 124 Am St. 825.

[55] Cleve v. Chicago &c. R. Co., 77 Nebr. 166, 108 N. W. 982, 124 Am. St. 837, 15 Am. & Eng. Ann. Cas. 33 and note; Bartelt v. Oregon &c. Nav. Co., 57 Wash. 16, 106 Pac. 487, 135 Am. St. 959. See also, Colsch v. Chicago &c. R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C. 915, quoting from 4 Elliott R. R., § 1549.

[56] Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 56 Atl. 129, affd. 71 N. J. L. 339, 59 Atl. 1117. See cases cited in note 1, ante.

[57] Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116; Bartelt v. Oregon &c. Nav. Co., 57 Wash. 16, 106 Pac. 487, 135 Am. St. 959.

[58] See §§ 181-201. See also, Louisville &c. R. Co. v. Tharper (Ga. App.), 75 S. E. 677.

[59] "Transportation of Live Stock." 19 Cent. L. J. 161, 168; note 44 L. R. A. 449.

unless prevented by storm or some accident occurs, and that animals so unloaded shall be properly fed and watered by the owner or custodian, or, in case he fails so to do, by the railroad company, which will thereby acquire a lien for the food, care, and custody furnished, and shall not be liable for any detention of them. A penalty is imposed, recoverable in a civil action by the United States.[60] It has been held that this statute is constitutional as a regulation of interstate commerce,[61] that it does not apply to shipments from one point to another in the same state,[62] that the confinement of the whole shipment of animals without unloading in violation of the statute is a single offense, and not separate offenses for each animal carried,[63] and that an accident caused by the carrier's negligence is not an excuse for failure to comply with the statute.[64] This statute does not change or abrogate in any manner the carrier's common-law liability, and does not authorize him to hold stock twenty-eight hours in trains if such would be negligence,[65] nor prevent him from liability for negligence in their care if delayed by storm.[66]

§ 263. Termination of relation and delivery.—A carrier of live stock must deliver the cattle to the party designated by the terms of shipment, or to his order, at the place of destination, and where he delivers them to one not entitled to receive them, he is accountable.[67] The general rules as to the place, person,

[60] U. S. Rev. Stat., §§ 4386, 4387, 4388, 4389. For full review of cases construing this statute see Wabash R. Co. v. United States, 178 Fed. 5, 101 C. C. A. 133, 21 Am. & Eng. Ann. Cas. 819, and note. By amendment of June 20, 1906, the time was changed to thirty-six hours where the owner or custodian so requests in writing.

[61] United States v. Boston &c. R. Co., 15 Fed. 209.

[62] United States v. East Tennessee &c. R. Co., 13 Fed. 642, 9 Am. & Eng. R. Cas. 259.

[63] United States v. Boston &c. R. Co., 15 Fed. 209.

[64] Newport News &c. Co. v. United States, 61 Fed. 488, 9 C. C. A. 579; Nashville &c. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Chesapeake & O. R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

[65] Nashville C. & St. L. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Missouri Pac. R. Co. v. Ivy, 79 Tex. 444, 15 S. W. 692; Chesapeake & O. R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449. And a carrier cannot contract that the shipper will unload and relieve itself from liability under this clause, and if it does give the shipper opportunity to unload, it is negligence per se. Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883.

[66] Chicago, B. & Q. R. Co. v. Slattery, 76 Nebr. 721, 107 N. W. 1045, 124 Am. St. 825.

[67] North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727,

manner and time of delivery applying to carriers of goods equally apply to carriers of live stock.

§ 264. **Delivery to connecting carrier.**—Delivery to a connecting carrier is completed by carrying to the terminus on the connecting road and notifying the second carrier of the arrival or when the second carrier has in fact taken control of the stock.[68] The first carrier is held liable for injuries occasioned by a defective or unsuitable car after delivery to the connecting carrier,[69] even though he had contracted to be liable only for loss occasioned during transportation over his own line[70] or the shipper's agent saw them put in an unsuitable car.[71] Liability of the first carrier ordinarily ceases, however, upon delivery to the connecting carrier,[72] unless by contract he has assumed the through transportation of stock to a point beyond his terminus.[73] The first carrier may be negligent if he transfers to a connecting carrier without giving opportunity for feeding and watering the stock, though requested by the shipper;[74] likewise he is liable if he forwards them over a different route from that selected by the shipper,[75] nor is the obligation to deliver at a proper place and in a proper manner, conditioned on the shipper accompanying the stock.[76] The carrier must furnish suitable appliances for unloading,[77] and if he delivers directly to a stockyard, and not at its station, he may make a separate terminal charge for delivery at the stockyards,[78] and where the carrier fails in his duty to furnish

31 L. ed. 287, 8 Sup. Ct. 266. See note to Duntley v. Boston &c. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 451, 49 Am. St. 610.

[68] Louisville, St. L. & T. R. Co. v. Bourne, 16 Ky. L. 825, 29 S. W. 975; Texas & P. R. Co. v. Scoggin, 40 (Tex. Civ. App.) 526, 90 S. W. 521.

[69] Jones v. St. Louis &c. R. Co., 115 Mo. App. 232, 91 S. W. 158; Eckert v. Pennsylvania R. Co., 211 Pa. St. 267, 60 Atl. 781, 107 Am. St. 571.

[70] Indianapolis, B. & W. R. Co. v. Strain, 81 Ill. 504.

[71] Eckert v. Pennsylvania R. Co., 211 Pa. 267, 60 Atl. 781, 107 Am. St. 571.

[72] Cincinnati &c. R. Co. v. Greening, 30 Ky. L. 1180, 100 S. W. 825; Nashville &c. R Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955.

[73] Ohio &c. R. Co. v. McCarthy, 96 U. S. 258 24 L. ed. 693.

[74] Galveston, H. & S A. R. Co. v. Irey (Tex. Civ. App.), 23 S. W. 321.

[75] Texas &c. R. Co. v. Eastin, 100 Tex. 556, 102 S. W. 105. And if the shipper in a letter to the carrier directs delivery to one connecting carrier, the agent who delivered to the first carrier has no authority to direct delivery to another, and the carrier is liable for delivery as this agent directed. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. 45.

[76] Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. 45.

[77] Paramore v. Western R. Co, 53 Ga. 383.

[78] Texas &c. R. Co. v. Gray (Tex. Civ. App.), 99 S. W. 1125.

suitable yards and facilities for the delivery of stock which he contracts to carry, he may be compelled to deliver through the facilities which the consignee furnished.[79] The presumption that the cattle were injured in the possession of the last carrier[80] does not seem to hold if the shipper accompanied the cattle.[81] As was said, the general rules applying to the carrier of goods are equally applicable to the carrier of live stock, and this chapter has sufficiently dealt with the peculiarities in those rules caused by the nature of the freight where the contract is to carry live animals.

[79] Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. 461.

[80] Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883.

[81] Walker v. Keenan, 73 Fed. 755, 19 C. C. A. 668; Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

CHAPTER XVI.

CARRIERS OF PASSENGERS.

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§ 265. **Defined and distinguished.**—A carrier of passengers is not a bailee, as is a carrier of goods. The carrier of goods has the unlimited control of them, and it is considered that their safety depends upon the care which he gives to them. But a passenger is a person, with intelligence and the power of locomotion, enabling him largely to care for himself, and is not entirely under the carrier's control. Therefore while the carrier of goods is held to be an insurer of their safety, the common carrier of passengers "is not, under the law, an insurer of their safety,

nevertheless the law requires of it the exercise of the highest degree of care consistent with the mode of its conveyance and the practical prosecution of its business for the safety and protection of its passengers."[1] The carrier of goods may be also the carrier of passengers, and may carry both goods and passengers upon the same conveyance. In relation to the baggage of passengers, the carrier of passengers is the carrier of goods. In the holding out as carrying persons for hire, the carrier of passengers is similar to the carrier who holds himself out as carrying goods for hire, and though the law relating to the carrier of passengers is not a part of the law of bailments, yet, because of its similarity to the law of carriers of goods, it is usually and properly considered in connection with the law of bailments.

§ 266. **Kinds of passenger carriers.**—Railroad companies, because of the nature of their business, hold themselves out as public carriers of passengers, and to the capacity of their passenger trains they must carry all suitable persons who offer themselves in conformity with the company's reasonable rules.[2] In general, they are not obliged to carry passengers on freight trains,[3] unless they have by custom held themselves out as public carriers of passengers thereon, or special trains,[4] and, ordinarily, the railroad company is not deemed a carrier of passengers as to one allowed to ride on a freight train,[5] a log train,[6] a work train, construction train, hand car, locomotive or engine cab.[7] Where one

[1] Indiana Union Tr. Co. v. Keiter, 175 Ind. 268, 92 N. E. 982; Louisville &c. Tr. Co. v. Korbe, 175 Ind. 450, 93 N. E. 5; Millmore v. Boston Electric R. Co., 194 Mass. 323, 80 N. E. 445, 120 Am. St. 558, 11 L. R. A. (N. S.) 140. See note 97 Am. St. 527, as to degree of care. A common carrier of passengers is held to utmost practicable care. Interurban R. & T. R. Co. v. Hancock, 75 Ohio St. 88, 78 N. E. 964, 116 Am. St. 710.

[2] Elliott R. R. (2d ed.), § 1574; Lake Erie & W. R. Co. v. Acres, 108 Ind. 548, 9 N. E. 453, 28 Am. & Eng. R. Cas. 112; Bennett v. Dutton, 10 N. H. 481; Mershon v. Hobensack, 22 N. J. L. 372, affd. 23 N. J. L. 580; Jencks v. Coleman, 2 Sumn. (U. S.) 221, Fed. Cas. No. 7258.

[3] Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822, 58 Am. & Eng. R. Cas. 4; Illinois Cent. R. Co. v. Nelson, 59 Ill. 110; Powers v. Boston & M. R. Co., 153 Mass. 188, 26 N. E. 446. See note 5 Am. & Eng. Ann. Cas. 43.

[4] McCarter v. Greenville Tr. Co., 72 S. Car. 134, 51 S. E. 545, 5 Am. & Eng. Ann. Cas. 42 and note.

[5] See cases cited in note 3. As to one riding on a log train, see Johnson v. Louisiana R. & Nav. Co., 129 La. 332, 56 So. 301, 36 L. R. A. (N. S.) 887.

[6] See Harvey v. Deep River Logging Co., 49 Ore. 583, 90 Pac. 501, 12 L. R. A. (N. S.) 131n.

[7] Elliott R. R. (2d ed.), § 1578;

railroad company owns the roadbed and track, and another is operating cars thereon, the operating company is the carrier of passengers.[8] The receiver or trustee operating a railroad is held a carrier of passengers.[9] Other common carriers of passengers are the operators of street railroads,[10] stagecoaches,[11] steamboats,[12] sea-going vessels,[13] omnibuses,[14] ferries,[15] or all who hold themselves out as carrying the public for hire within the limitations of their business. The carrier need not own his conveyance.[16] It has been held that the owner of a passenger elevator is a common carrier of passengers,[17] likewise the owner of a sightseeing automobile,[18] and that the proprietor of a scenic railway operated for amusement purposes is a common carrier as to the degree of care owed to his passengers.[19] A livery stable keeper merely as such is not a common carrier.[20]

Menaugh v. Bedford R. Co., 157 Ind. 20, 60 N. E. 694; Hoar v. Maine Central R. Co., 70 Maine 65, 35 Am. Rep. 299; Giles v. Boston & A. R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. 411; Stringer v. Missouri Pac. R. Co., 96 Mo. 299, 9 S. W. 905; Rathbone v. Oregon R. Co., 40 Ore. 225, 66 Pac. 909; Burns v. Southern R. Co., 63 S. Car. 46, 40 S. E. 1018; International & G. N. R. Co. v. Hanna (Tex. Civ. App.), 58 S. W. 548. See Grimshaw v. Lake Shore &c. R. Co., 205 N. Y. 371, 98 N. E. 762, 40 L. R. A. (N. S.) 563 and note.

[8] Byrne v. Kansas City &c. R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; Chicago, R. I. & P. R. Co. v. Groves, 56 Kans. 601, 44 Pac. 628; Smith v. St. Louis &c. R. Co., 85 Mo. 418, 55 Am. Rep. 380.

[9] Lamphear v. Buckingham, 33 Conn. 237; Jones v. Pennsylvania R. Co., 19 D. C. 178; Klein v. Jewett, 26 N. J. Eq. 474, affd. 27 N. J. Eq. 550; Washington, Alexander & Georgetown R. Co. v. Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675.

[10] Dean v. Chicago General R. Co., 64 Ill. App. 165; Pray v. Omaha St. R. Co., 44 Nebr. 167, 62 N. W. 447, 48 Am. St. 717; Spellman v. Lincoln &c. R. Co., 36 Nebr. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. 753.

[11] Bennett v. Dutton, 10 N. H. 481.

[12] Jencks v. Coleman, 2 Sumn. (U. S.) 221.

[13] Thomp. Neg., § 6417.

[14] Parmelee v. McNulty, 19 Ill. 556.

[15] Spirey v. Farmer, 3 N. Car. 519; Hopkins v. W. Jersey &c. R. Co., 225 Pa. St. 193, 73 Atl. 1104, 17 Am. & Eng. Ann. Cas. 371 and note. But persons owning an island in a river maintaining on it places of amusement, operating thereto a ferry, and carrying excursions, are not common carriers of passengers. Meisner v. Detroit, B. I. & W. Ferry Co., 154 Mich. 545, 118 N. W. 14, 19 L. R. A. (N. S.) 872, 129 Am. St. 493.

[16] Counie Glove Co. v. Merchants' Dispatch Co., 130 Iowa 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060, 114 Am. St. 419.

[17] Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334, 64 N. E. 369; Springer v. Ford, 88 Ill. App. 529.

[18] Hinds v. Steere, 209 Mass. 442, 95 N. E. 844, 35 L. R. A. (N. S.) 658.

[19] O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054n, 134 Am. St. 331, 17 Am. & Eng. Ann. Cas. 407.

[20] McGregor v. Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. 919.

§ 267. **Who must be carried.**—The carrier of passengers must not discriminate without good cause between those who apply for carriage, and must carry all such if there are no legal objections and proper compensation is paid or tendered, and they are able to take care of themselves,[21] for carriers of passengers are common carriers. But as the carrier of goods only carries such goods as are in fit condition to be carried, so the passenger carrier may exclude those who are not proper to be carried, as those afflicted with contagious disease,[22] drunk,[23] insane,[24] so ill as to require medical attendance upon an ocean steamer,[25] those who may have evil designs upon the carrier or its passengers, or whose object is to interfere with the carrier's business,[26] those of bad character or indecent habits,[27] or who refuse to submit to the reasonable regulations of the carrier,[28] or one who would be exposed to personal danger from the populace if carried.[29] The carrier may exclude one who because of disability may be likely to need more than ordinary attention,[30] or is helpless, as a blind man.[31] But to some of these rules there are exceptions or qualifications. A blind man may be excluded unless the carrier

[21] Elliott R. R. (2d ed.), §§ 1574, 1575, 1576; Price v. St. Louis, I. M. & S. R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; Ill. Central R. Co. v. Smith, 85 Miss. 349, 37 So. 643, 70 L. R. A. 642, 107 Am. St. 293 and note. See cases cited in note 2 and in notes 22 to 33.

[22] Louisville & N. R. Co. v. Du Bose, 120 Ga. 339, 47 S. E. 917; Du Bose v. Louisville & N. R. R. Co., 121 Ga. 308, 48 S. E. 913; Thurston v. Union Pac. R. Co., 4 Dill. (U. S.) 321, Fed. Cas. No. 14019. But the carrier is liable for breach of an express contract to carry one afflicted with smallpox. Jenkins v. Chesapeake &c. R. Co., 61 W. Va. 597, 57 S. E. 48, 11 Am. & Eng. Ann. Cas. 96; Pullman Car Co. v. Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103, 8 Am. & Eng. Ann. Cas. 218.

[23] Price v. St. Louis, I. M. & S. R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79.

[24] Meyer v. St. Louis R. Co., 54 Fed. 116, 4 C. C. A. 221; Owens v. Macon &c. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946. See note 26 L. R. A. (N. S.) 171.

[25] Connors v. Cunard Steamship Co., 204 Mass. 310, 90 N. E. 601, 26 L. R. A. (N. S.) 171n, 134 Am. St. 662, 17 Am. & Eng. Ann. Cas. 1051.

[26] Thurston v. Union Pac. R. Co., 4 Dill. (U. S.) 321; The D. R. Martin, 11 Blatchf. (U. S.) 233.

[27] Jencks v. Coleman, 2 Sumn. (U. S.) 221, Fed. Cas. No. 7258; Stephenson v. West Seattle &c. Co., 22 Wash. 84, 60 Pac. 51.

[28] Elliott R. R. (2d ed.), § 1576; Crawford v. Cincinnati, H. & D. R. Co., 26 Ohio St. 580; Drake v. Penna. R. Co., 137 Pa. St. 352, 20 Atl. 994, 21 Am. St. 883.

[29] Pearson v. Duane, 4 Wall. (U. S.) 605, 18 L. ed. 447.

[30] Croom v. Chicago, M. & St. P. R. Co., 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. 557.

[31] Illinois Central R. Co. v. Allen, 121 Ky. 138, 89 S. W. 150, 11 Am. & Eng. Ann. Cas. 970; Illinois Central R. Co. v. Smith, 85 Miss. 349, 37 So. 643, 70 L. R. A. 642, 107 Am. St. 293n.

knows that he is competent to travel alone.[32] The carrier may demand that the insane be properly attended and safely restrained, and may even then refuse if they are liable to become obnoxious or dangerous to other persons.[33] Those who are so intoxicated as to be dangerous, or annoying, or unable to care for themselves may be excluded.[34]

§ 268. Creation of relation—Offer to become passenger. —A passenger is one, not an employé of the carrier in its service, who undertakes with the carrier's consent to travel in the carrier's conveyance. The relation of carrier and passenger depends upon the existence of a contract of carriage, express or implied, between the carrier and the passenger,[35] and begins when one with the intention of becoming a passenger puts himself in the care of the carrier, or directly within its control.[36] It is not necessary to purchase a ticket to create the relation, but it may be sufficient in case of a railroad if one has entered a place provided for reception of passengers at a time when it is open for such purpose, with the intention to take a train.[37] The general rule is that every one who is on the public conveyance usually employed for the carriage of passengers, and there for the purpose of carriage with the consent, express or implied, of the

[32] Zachery v. Mobile & O. R. Co., 74 Miss. 520, 21 So. 246, 36 L. R. A. 546, 60 Am. St. 529, 75 Miss. 746, 23 So. 434, 41 L. R. A. 385, 65 Am. St. 617. See cases cited in note 31.

[33] Owens v. Macon &c. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946; Louisville &c. R. Co. v. Brewer, 147 Ky. 166, 143 S. W. 1014.

[34] Price v. St. Louis, I. M. & S. R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; Pittsburgh, C. & St. Louis R. W. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Story v. Norfolk & S. R. Co., 133 N. Car. 59, 45 S. E. 349.

[35] For definition of passenger, see Alabama City G. & A. R. Co. v. Bates, 149 Ala. 487, 43 So. 98; Elliott R. R. (2d ed.), § 1579; 6 Words and Phrases, 5218-5219; Birmingham R. &c. Co. v. Adams, 146 Ala. 267, 40 So. 385, 119 Am. St. 27; Mendenhall v. Atchison &c. R. Co., 66 Kans. 438, 71 Pac. 846, 61 L. R. A. 120 97 Am. St. 380; O'Donnell v. Kansas City &c. R. Co., 197 Mo. 110, 95 S. W. 196, 114 Am. St. 753.

[36] Elliott R. R. (2d ed.) § 1579. Alabama City G. &. A. R. Co. v. Bates, 149 Ala. 487, 43 So. 98.

[37] Elliott R. R. (2d ed.), § 1579; Rogers v. Kennebec Steamboat Co., 86 Maine 261, 26 Atl. 1069, 25 L. R. A. 491, 3 Am. Neg. Cas. 590; Smith v. St. Paul &c. R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 50. One who is attempting to board, as a passenger, a train of one of several railroad companies using common tracks through a station is owed the care due a passenger by all the railroads using the station, it is held. Chicago R. I. & P. R. Co. v. Stepp, 164 Fed. 785, 22 L. R. A. (N. S.) 350. But see, Hunt v. New York &c. R. Co., 212 Mass. 102, 98 N. E. 787, 40 L. R. A. (N. S.) 778, holding that one is not a passenger until he is about to step upon a train.

owner, is presumptively a passenger.[38] The two essential elements of the relationship are the undertaking of the person to travel in the carrier's conveyance and the acceptance of the person as a passenger by the carrier.[39]

§ 269. **Acceptance by carrier.**—Acceptance as a passenger is usually implied from circumstances rather than express.[40] Those waiting for a conveyance with the intention of boarding it, on the carrier's premises, in such a situation as to indicate their intention to the carrier's employés, are presumptively passengers.[41] Where one is riding upon a freight train, an engine, hand car or some conveyance upon which passengers are not carried, he is presumptively not a passenger,[42] but one riding upon a passenger conveyance is assumed to be there by the invitation of the employés of the carrier,[43] though this presumption may be rebutted by evidence. Persons are not passengers who ride voluntarily in places not intended for passengers, as in a baggage or mail car, or upon an engine,[44] unless accepted as

[38] Elliott Railroads (2d ed.), § 1578; Louisville, New Albany & Chicago, R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Pennsylvania R. Co. v. Price, 96 Pa. St. 256, 2 Ky. L. 183; Bricker v. Philadelphia R. R. Co., 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. 585; Chattanooga Rapid Transit Co. v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886.

[39] Berry v. Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

[40] Elliott R. R. (2d ed.), § 1578, 1579; Alabama City G. & A. R. Co. v. Bates, 149 Ala. 487, 43 So. 98.

[41] Fremont, E & M. V. R. Co. v. Hagblad, 72 Nebr. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, 9 Am. & Eng. Ann. Cas. 1096 and note. See cases cited under note 37.

[42] Vassar v. Atlantic Coast Line R. Co., 142 N. Car. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950, 9 Am. & Eng. Ann. Cas. 535 and note. See cases cited in notes 5, 6, 7.

[43] See note to 9 Am. & Eng. Ann. Cas. 535; Bryant v. Chicago, St. P., M. & O. Ry. Co., 53 Fed. 997, 4 C. C. A. 146; Fitzgibbon v. Chicago &c. R. Co., 119 Iowa 261, 93 N. W. 276. One riding on a bus gratuitously at the driver's invitation is a passenger. Palmer Transfer Co. v. Smith, 137 Ky. 319, 125 S. W. 725, 136 Am. St. 295. But one who takes passage on a freight train under an agreement with the conductor to render services for his transportation is a volunteer, and assumes the risk. St. Louis &c. R. Co. v. Jones, 96 Ark. 558, 132 S. W. 636, 37 L. R. A. (N. S.) 418.

[44] Clark v. Colorado &c. R. Co., 165 Fed. 408, 19 L. R. A. (N. S.) 988; Chicago &c. R. Co. v. Field, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. 444; Wilcox v. San Antonio &c. R. Co., 11 Tex. Civ. App. 487, 33 S. W. 379; Kirk v. Seattle El. Co., 58 Wash. 283, 108 Pac. 604, 31 L. R. A. (N. S.) 991n. But the carrier's agent may assent to one riding in such a place. Parks v. St. Louis &c. R. Co., 178 Mo. 108, 77 S. W. 70, 101 Am. St. 425. See Pennsylvania R. Co. v. Brooks, 57 Pa. St. 339, 98 Am. Dec. 229. One riding on the step or running board of a street car, is not a passenger, unless accepted as such. Lockwood v. Boston Elevated R. Co., 200 Mass 537, 86 N. E. 934, 22 L. R.

such.[45] Those paying fare are passengers,[46] and so may be those who have boarded the wrong conveyance by mistake.[47] One riding on a drover's pass is a passenger,[48] for there is a consideration for his transportation in that he takes care of the stock, and thus to a degree relieves the carrier of duties, though the risk may be somewhat limited, as to him, by the duties which he undertakes and the character of vehicle on which he rides.[49] An employé on private business, traveling on a pass, is a passenger,[50] but not usually so if simply traveling to or from work.[51] A street car employé, who rides from his place of employment to his home by his own volition and not by the direction of his employer, is a passenger, though he pays his fare in coupons issued by the company as a part of his wages.[52] Those pursuing special

A. (N. S.) 488; Hogner v. Boston Elevated R. Co., 198 Mass. 260, 84 N. E. 464, 15 L. R. A. (N. S.) 960, and note.

[45] Kirkpatrick v. Metropolitan St. R. Co. (Ky.), 143 S. W. 865.

[46] Union &c. R. Co. v. Nichols, 8 Kans. 505, 12 Am. Rep. 475; McNeill v. Durham & C. R. Co., 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227; Pennsylvania R. Co. v. Price, 96 Pa. St. 256, 2 Ky. L. 183; Bricker v. Pennsylvania R. Co., 132 Pa. St. 1, 18 Atl. 983.

[47] Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. 144, 3 Am. Negl. Cases 186; Lake Shore & M. S. R. Co. v. Rozevizweig, 113 Pa. St. 519, 6 Atl. 545. But see contra, Robertson v. Boston & N. St. R. Co., 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588 and note, 112 Am. St. 314.

[48] Lake Shore &c. R. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425; Hedrick v. Missouri Pac. R. Co., 195 Mo. 104, 93 S. W. 268, 6 Am. & Eng. Ann. Cas. 793, and note; Otto v. Chicago, B. & Q. R. Co., 87 Nebr. 503, 127 N. W. 857, 31 L. R. A. (N. S.) 632 and note, 138 Am. St. 496. But an immigrant who accompanies his stock and goods to care for them is not a passenger when sleeping in the car after the destination has been reached and the stock unloaded, and his goods are fully protected in the car and sleeping accommodations could have been obtained at a nearby hotel. Chicago, R. I. & P. R. Co. v. Thurlow, 178 Fed. 894, 102 C. C. A. 128, 30 L. R. A. (N. S.) 571n.

[49] Missouri Pac. R. Co. v. Tietken, 49 Nebr. 130, 68 N. W. 336, 59 Am. St. 526.

[50] Elliott R. R. (2d ed.), § 1578a, and cases cited; Whitney v. New York R. Co., 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615; Ohio & Mississippi R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336.

[51] Elliott R. R. (2d ed.), § 1578a; Birmingham R. Light & Power Co. v. Sawyer, 156 Ala. 199, 47 So. 67, 19 L. R. A. (N. S.) 717; Kilduff v. Boston &c. R. Co., 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873; Gilshannon v. Stony Brook &c. R. Co., 10 Cush. (Mass.) 228; Sanderson v. Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. 841.

[52] Hebert v. Portland R. Co., 103 Me. 315, 69 Atl. 266, 125 Am. St. 297, 13 Am. & Eng. Ann. Cas. 886, and note. See also, Enos v. Rhode Island Suburban R. Co., 28 R. I. 291, 67 Atl. 5, 12 L. R. A. (N. S.) 244.

callings on trains, as railway mail clerks,[53] express messengers,[54] and in some jurisdictions those who pay for the privilege of selling popcorn, fruit and the like on trains, or keeping a bar on a boat,[55] are passengers, though it is held that news agents are not.[56] The employés of a sleeping car company, though not passengers, are entitled to due care for their protection,[57] but liability as to them may be contracted against.[58] Where a company simply furnishes power to move a special train, as a circus train, those upon the circus train are not passengers.[59] Trespassers,[60] tramps,[61] and defrauders[62] are not passengers.

As a general rule, one who goes upon a train or conveyance to attend or visit a passenger is not held to be a passenger,[63] though there is a duty owing to him by the carrier.[64] One entering a train

[53] Lindsey v. Pennsylvania R. Co. 26 App. Cas. (D. C.) 503, 6 Am. & Eng. Ann. Cas. 862; Malott v. Central Trust Co., 168 Ind. 428, 79 N. E. 369, 11 Am. & Eng. Ann. Cas. 879; Barker v. Chicago, P. & St. L. R. Co., 243 Ill. 482, 90 N. E. 1057, 134 Am. St. 382.

[54] Davis v. Chesapeake & Ohio R. Co., 122 Ky. 528, 29 Ky. L. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458, 121 Am. St. 481, 12 Am. & Eng. Ann. Cas. 723, and note. Contra, Robinson v. St. Johnsbury & L. C. R. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249; Peterson v. Chicago & N. W. R. Co., 119 Wis. 197, 96 N. W. 532, 100 Am. St. 879.

[55] Yeomans v. Contra Costa Steam N. Co., 44 Cal. 71; Commonwealth v. Vermont &c. R. Co., 108 Mass. 7, 11 Am. Rep. 301.

[56] Smallwood v. Baltimore &c. R. Co., 215 Pa. St. 540, 64 Atl. 732, 7 Am. & Eng. Ann. Cas. 525, and note.

[57] Hughson v. Richmond &c. R. Co., 2 App. Cas. (D. C.) 98, 22 Wash. L. 55; and see Jones v. St. Louis Southwestern R. Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. 514.

[58] Denver & R. G. R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432n, 12 Am. & Eng. Ann. Cas. 732; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674n, 106 Am. St. 187; Russell v. Pittsburg &c. R. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. 214.

[59] Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. 482.

[60] Elliott R. R. (2d ed.), § 1581; Berry v. Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229; Radley v. Columbia Southern R. Co., 44 Ore. 332, 75 Pac. 212.

[61] Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. 17n; Bricker v. Philadelphia R. Co., 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. 585.

[62] Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450 (one attempting to "beat" his way); Fitzmaurice v. New York, N. H. & H. R. Co., 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, 116 Am. St. 236, 7 Am. & Eng. Ann. Cas. 586 (a girl who fraudulently represents herself a student under 18, to get a reduced rate); Grahn v. International &c. R. Co., 100 Tex. 27, 93 S. W. 104, 5 L. R. A. (N. S.) 1025 and note, 123 Am. St. 767 (one who rides by stealth and secret agreement with conductor).

[63] Elliott R. R., § 1578; Seattle, Pacific Coast Co. v. Jenkins, 150 Fed. 537, 10 Am. & Eng. Ann. Cas. 159, and note; Hill v. Louisville &c. R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A. (N. S.) 432; Louisville & N. R. Co. v. Wilson, 124 Ky. 846, 100 S. W. 290, 8 L. R A. (N. S.) 1020.

[64] Elliott R. R. (2d ed.), § 1578; Southern R. Co. v. Patterson, 148 Ala. 77, 41 So. 964, 121 Am. St. 30. See Pacific Coast Co. v. Jenkins, 150

on private business, as to collect a debt from a passenger, is held a trespasser.[65] One who has hailed a vehicle with the intention of boarding, and who has been accepted by the one in charge of the vehicle stopping it to receive him, is a passenger, and may recover for injuries received in attempting to board the conveyance, though he did not actually enter.[66] A safe general rule is that a person becomes a passenger, when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting-room, or the like, at a time when such a place is open for the reception of persons intending to take passage on the vehicles of the carrier,[67] at least, if he indicates such intention in some manner to the carrier's agents.[68] He is not a passenger when merely on his way to the station,[69] unless he is riding in the carrier's vehicle.[70] It is not necessary that fare has been prepaid, if there is an intention to pay it,[71] and persons re-

Fed. 537, 80 C. C. A. 279, 10 L. R. A. (N. S.) 969 and note, for circumstances under which a vessel should return to a wharf and put off one who has come on board to visit a passenger, and has failed to leave the boat before it swung away from the wharf.

[65] McElvane v. Central of Ga. R. Co., 170 Ala. 525, 54 So. 489, 34 L. R. A. (N. S.) 715.

[66] Brien v. Bennett, 8 C. & P. 724; Western & A. R. Co. v. Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; Rogers v. Kennebec Steamboat Co., 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491. See note 9 Am. & Eng. Ann. Cas. 1104. One becomes a passenger when motorman has responded to his signal to stop an interurban car. Karr v. Milwaukee Light & Heat & Traction Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283 and note, 122 Am. St. 1017. In case of a street car one is not a passenger until he steps on (Duchemin v. Boston Elevated R. Co., 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. 580, 1 Am. & Eng. Ann. Cas. 603; Lockwood v. Boston &c. Co., 200 Mass. 537, 22 L. R. A. (N. S.) 488), or when he gets on a plank used for the purpose in order to step on. Messenger v. Valley City St. T. & I. R. Co., 21 N. Dak. 82, 128 N. W. 1023, 32 L. R. A. (N. S.) 881.

[67] See cases cited under note 37. One with a round trip ticket for passage on a steamboat, who is waiting at the steamer company's dock, is a passenger. White v. Seattle, E. & T. Nav. Co., 36 Wash. 281, 78 Pac. 909, 104 Am. St. 948. One who goes to the station a few minutes before train time to leave his hand baggage is a passenger, although he intends to go out again on personal business before his train arrives. Metcalf v. Yazoo & M. V. R. Co., 97 Miss. 455, 52 So. 355, 28 L. R. A. (N. S.) 311, and note. See Pere Marquette R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041n.

[68] Dieckman v. Chicago & N. W. R Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A. (N. S.) 338n, 139 Am. St. 420; Atchison &c. R. Co. v. Holloway, 71 Kans. 1, 80 Pac. 31, 15 L. R. A. (N. S.) 908n, 114 Am. St. 462.

[69] Mitchell v. Augusta & A. R. Co., 87 S. Car. 375, 69 S. E. 664, 31 L. R. A. (N. S.) 442. (As one 125 yards from station.)

[70] Buffitt v. Troy R. Co., 40 N. Y. 168, 36 Barb. (N. Y.) 420.

[71] One who has paid fare to a certain point is not required to leave

ceived by invitation in vehicles not ready to start are passengers.[72]

The passenger does not lose his rights as such by temporary absence from the conveyance, but if the absence was for an incidental purpose and not necessary to the transportation, he is not considered a passenger while absent.[73] One who assists the agent of the carrier in an emergency, though a volunteer in this work, may still be a passenger;[74] likewise, one who leaves a train and goes to the relief of his brother who was injured by the carrier's servants.[75] A child with its parent,[76] or other person carried free, is a passenger, and the duty to guard one carried gratuitously on a free pass is the same as the duty to the one who pays his fare,[77] but the carrier may contract against liability to the one carried on a free pass.[78]

§ 270. Duties of carrier toward passenger.—The passenger carrier must generally accept without discrimination all who present themselves properly and ask transportation,[79] and sell

the train, but, if he wishes to continue, may remain, paying fare on demand. Anderson v. Missouri Pac. R. Co., 196 Mo. 442, 93 S. W. 394, 113 Am. St. 748.

[72] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219. But one, who, without invitation, and contrary to custom, goes into a train before it is made up, is not a passenger. Raines v Chesapeake &c. R. Co., 68 W. Va. 694, 70 S. E. 711.

[73] Philadelphia & R. R. Co. v. Young, 90 Fed. 709, 33 C. C. A. 251; Chicago, R. I. & P. R. Co. v. Sattler, 64 Nebr. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. 666; Parsons v. N. Y. Central &c. R. Co., 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683n, 10 Am. St. 450. A passenger on a crowded street car does not cease to be such by momentarily stepping off to allow others to alight. Tompkins v. Boston Elevated R. Co., 201 Mass. 114, 87 N. E. 488, 20 L. R. A. (N. S.) 1063, 131 Am. St. 392.

[74] McIntyre R. Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803; Lake Shore & M. S. R. Co. v. Salzman, 52 Ohio St. 558, 40 N. E. 891, 31 L. R. A. 261, 49 Am. St. 745.

[75] Layne v. Chesapeake &c. R. Co., 68 W. Va. 213, 69 S. E. 700, 31 L. R. A. (N. S.) 414.

[76] Ball v. Mobile Light and Power Co., 146 Ala. 309, 39 So. 584, 119 Am. St. 32, 9 Am. & Eng. Ann. Cas. 962; Southern R. Co. v. Lee, 30 Ky. L. 1360, 101 S. W. 307, 10 L. R. A. (N. S.) 837.

[77] Ryckman v. Hamilton &c. R. Co., 10 Ont. L. R. 419, 4 Am. & Eng. Ann. Cas. 1126; Indianapolis T. & T. Co. v. Lawson, 143 Fed. 834, 5 L. R. A. (N. S.) 721n, 6 Am. and Eng. Ann. Cas. 666; Indianapolis T. & T. Co. v. Klentschy, 167 Ind. 598, 79 N. E. 908, 10 Am. & Eng. Ann. Cas. 869. See note 12 Am. & Eng. Ann. Cas. 677; Coggs v. Bernard, 1 Smith's Ld. Cases (8th ed.) 369; Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. ed. 291. A police officer carried free under an invalid city ordinance is a passenger. Gabbert v. Hackett, 135 Wis. 86, 115 N. W. 345, 14 L. R. A. (N. S.) 1070.

[78] See cases cited in note 77. See § 286, post.

[79] See cases cited under note 2; Meismer v. Detroit &c. R. Co., 154 Mich. 545 118 N. W. 14, 19 L. R. A. (N. S.) 872, 129 Am. St. 493.

accommodations and tickets to them in the order of application.[80] However, a railroad company may run a special limited for those who have sleeping car accommodations, and require the purchase of a berth before carrying a passenger in it, and exclude him for failure to purchase a berth.[81]

We have seen that there are several grounds upon which passengers may be rejected. There can be no refusal on account of color or race, but it is not discrimination to provide separate accommodations for colored people, in the absence of statute preventing, by carriers engaged either in interstate[82] or intrastate commerce,[83] and a statute compelling such separation is not invalid.[84] So it is reasonable to provide separate accommodations for women.[85] A railroad company must stop at a flag station when signaled to receive passengers if it is its custom to stop trains of the kind signaled.[86] Having accepted one as a passenger, it is the duty of the carrier to furnish him transportation according to contract, to take him on the proper vehicle for which he has contracted, and to furnish him equal accommodations with other passengers, though different rates may be charged for differing degrees of accommodation, and every contract is made subject to the reasonable regulations of the carrier.[87]

§ 271. **Carrier's duty as to accommodations.**—The carrier is held to a very high degree of care as to the character of his

[80] Where a purser refused to sell a berth to a person who applied, but afterward sold berths to those applying later, the carrier is liable. Patterson v. Old Dominion Steamship Co., 140 N. Car. 412, 53 S. E. 224, 5 L. R. A. (N. S.) 1012, 111 Am. St. 848.

[81] Ames v. Southern Pac. R. Co., 141 Cal. 728, 75 Pac. 810, 99 Am. St. 98.

[82] Chiles v. Chesapeake &c. R. Co., 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. 667, 20 Am. & Eng. Ann. Cas. 980 and note.

[83] See note 20 Am. & Eng. Ann. Cas. 982.

[84] State v. Patterson, 50 Fla. 127, 39 So. 398, 7 Am. & Eng. Ann Cas. 272.

[85] Chilton v. St. Louis &c. R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; Peck v. New York &c. R. Co., 70 N. Y. 587.

[86] Southern R. Co. v. Wallis, 133 Ga. 553, 66 S. E. 370, 30 L. R. A. (N. S.) 401n, 18 Am. & Eng. Ann. Cas. 67; Williams v. Carolina &c. R. Co., 144 N. Car. 498, 57 S. E. 216, 12 L. R. A. (N. S.) 191, 12 Am. & Eng. Ann. Cas. 1000. An electric car must stop at a regular station for a passenger signaling, and it is not sufficient to stop at some distance past. Christian v. Augusta &c. R. Co., 87 S. Car. 123, 69 S. E. 17, Ann. Cas. 1912B. 995.

[87] St. Louis A. & T. R. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. 766.

vehicles, equipment, and appliances,[88] and the condition of his roadbed, if a railroad carrier,[89] and must use modern and improved appliances, the rule being that railroad companies are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers. While the law demands the utmost care for the safety of the passengers, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expense as would make their business wholly impracticable, and drive prudent men from it. They are, however, without regard to their pecuniary ability to do so, required to provide all things necessary to the security of the passengers reasonably consistent with their business and appropriate to the means of conveyance employed by them, and to adopt the highest degree of practicable care, diligence and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same.[90]

Reasonable accommodations must be provided for the comfort of passengers, for instance, the carrier must have an adequate corps of servants,[91] if the journey is of requisite length, opportunity to procure food must be offered,[92] proper retiring places must be furnished,[93] a day coach must be supplied with seats suf-

[88] Elevated R. R. (2d. ed.) § 1587; Taylor v. Pennsylvania Co., 50 Fed. 755; Hanson v. Mansfield R. & Transp. Co., 38 La. Ann. 111, 58 Am. Rep. 162.

[89] Elliott R. R. (2d ed.), § 1586; Taylor v. Grand Trunk &c. R. Co., 48 N. H. 304, 2 Am. Rep. 229; Pennsylvania R. Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. 14, 2 L. R. A. 820n, 10 Am. St. 601, 37 Am. & Eng. R. Cas. 153.

[90] Elliott R. R. (2d ed.) § 1588; Louisville &c. R. Co. v. Jones, 83 Ala. 376, 3 So. 902; Irwin v. Louisville &c. R. Co., 161 Ala. 489, 50 So. 62, 135 Am. St. 153, 18 Am. & Eng. Ann. Cas. 773; Colorado &c. R. Co. v. McGeorge, 46 Colo. 15, 102 Pac. 747, 133 Am. St. 43; Wallace v. Wilmington &c. R. Co., 8 Houst. (Del.) 529, 18 Atl. 818; Adams v. Louisville &c. R. Co., 134 Ky. 620, 121 S. W. 419, 135 Am. St. 425; Kuhlen v. Boston &c. R. Co., 193 Mass. 341, 79 N. E. 815, 118 Am. St. 516.

[91] Murray v. Lehigh Valley R. Co., 66 Conn. 512, 34 Atl. 560, 32 L. R. A. 539.

[92] Story Bailments (9th ed.), § 597; Elliott R. R., § 1588a; Dodge v. Boston &c Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. 541.

[93] Wood v. Georgia R. Co., 84 Ga.

ficient for the ordinary number of passengers,[94] heat and light must be furnished,[95] and, in short, all accommodations reasonably necessary for the welfare and comfort of the passengers must be provided.[96] So, the carrier is held to the utmost practicable care in the operation of his train or other vehicle, and must employ only competent servants in this work.[97] He must maintain his stations and depots in such a condition as to be reasonably safe for the use by passengers, and must stop trains a reasonable length of time for passengers to get on, but in this respect is held only to ordinary care and not to the high degree of care necessary to keep safe his means of carriage itself.[98] He must maintain reasonably safe places for the discharge of passengers from cars,[99] and suitable appliances for boarding and alighting.[1]

363, 10 S. E. 967; Henderson v. Galveston H. & S. A. R. Co. (Tex. Civ. App.), 42 S. W. 1030.

[94] Chesapeake &c. R. Co. v. Austin, 137 Ky. 611, 126 S. W. 144, 136 Am. St. 307 and note. If conveyance is obstructed by standing cars, the carrier is liable for exposing passengers to the elements. Louisville & N. R. Co. v. Daugherty, 32 Ky. L. 1392, 108 S. W. 336, 15 L. R. A. (N. S.) 740. Not if delay is caused by act of God. Cormack v. New York, New Haven & Hartford R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209n; Prospert v. Rhode Island Suburban R. Co., 28 R. I. 367, 67 Atl. 522, 11 L. R. A. (N. S.) 1142n.

[95] Hastings v. Northern Pac. R. Co., 53 Fed. 224; Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769; 9 Am. & Eng. Ann. Cas. 553 and note; Louisville & N. R. Co. v. Scalf, 33 Ky. L. 721, 110 S. W. 862, 26 L. R. A. (N. S.) 263.

[96] Elliott R. R. (2d ed.), §§ 1588, 1589. Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 126 S. W. 144, 136 Am. St. 307 and note.

[97] Elliott R. R. (2d ed.), § 1589. White v. Fitchburg R. Co., 136 Mass. 321; McElroy v. Nashua & Lowell R. Co., 4 Cush. (Mass.) 400, 50 Am. Dec. 794; Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700n; Eaton v. Boston & Lowell R. Co., 11 Allen (Mass.) 500, 87 Am. Dec. 730. See cases cited in note 1.

[98] Elliott R. R. (2d ed.), § 1590; Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; McDonald v. Chicago &c. R. Co., 26 Iowa 124, 96 Am. Dec. 114n; Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 126 S. W. 144, 136 Am. St. 307 and note; Bennett v. Louisville & N. R. Co 102 U. S. 577, 26 L. ed. 235. Carrier must sufficiently light its station at night for reasonable time before and after arrival and departure of trains, to provide reasonable safety. Abbott v. Oregon R. & N. Co., 46 Ore. 549, 80 Pac. 1012, 1 L. R. A. (N. S.) 851n, 114 Am. St. 885, 7 Am. & Eng. Ann. Cas. 961.

[99] Mobile Light & R. Co. v. Walsh, 146 Ala. 290, 40 So. 559, 9 Am. & Eng. Ann. Cas. 853; Atchison &c. Co. v. McElroy, 76 Kans. 271, 91 Pac. 785, 13 L. R. A. (N. S.) 620n, 123 Am. St. 134; Powell v. Philadelphia &c. R. Co., 220 Pa. 638, 70 Atl. 268, 20 L. R. A. (N. S.) 1019.

[1] Traphagen v. Erie R. Co., 73 N. J. L. 759, 64 Atl. 1072, 67 Atl. 753, 9 Am. & Eng. Ann. Cas. 964. See, Hotenbrink v. Boston El. R. Co., 211 Mass. 77, 97 N. E. 624, 39 L. R. A. (N. S.) 419, and note.

§ 272. Duty to protect passengers from third persons.—The carrier must use a high degree of care to protect passengers from injury by the negligence or wilful misconduct of third persons,[2] or other passengers,[3] as intoxicated passengers,[4] or strikers,[5] or the acts of his employés outside of the scope of their employment;[6] must protect female passengers from insult or humiliation, as, where a conductor called a white woman a negro, the carrier was held liable,[7] and is liable for causing the unjustified arrest of a passenger,[8] but is under no duty to resist an officer in arresting a passenger.[9] The carrier owes the same duty to the

[2] Irwin v. Louisville & Nashville R. Co., 161 Ala. 489, 50 So. 62, 135 Am. St. 153, 18 Am. & Eng. Ann. Cas. 773 and note; St. Louis &c. R. Co. v. Shaw, 9 Ark. 15, 125 S. W. 654, 140 Am. St. 98; note, 97 Am. St. 527.

[3] Montgomery Transp. Co. v. Whatley, 152 Ala. 101, 44 So. 538, 126 Am. St. 17; Farrier v. Colorado Springs Rapid Transit Co., 42 Colo. 331, 95 Pac. 294, 126 Am. St. 158; Brown v. Chicago, R. I. Co., 139 Fed. 972, 72 C. C. A. 20, 2 L. R. A. (N. S.) 105. See Sure v. Milwaukee, Electric Ry. & Light Co., 148 Wis. 1, 133 N. W. 1098, 37 L. R. A. (N. S.) 724. See also, Louisville &c. R. Co. v. Brewer, 147 Ky. 166, 143 S. W. 1014, 39 L. R. A. (N. S.) 647 and note.

[4] Hillman v. Georgia R. & Banking Co., 126 Ga. 814, 56 S. E. 68, 8 Am. & Eng. Ann. Cas. 222; Spangler v. St. Joseph &c. R. Co., 68 Kans. 46, 74 Pac. 607, 63 L. R. A. 634, 104 Am. St. 391; Kline v. Milwaukee Electric R. Co., 146 Wis. 134, 131 N. W. 427, Ann Cas. 1912C. 276 and note.

[5] Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. 519 and note.

[6] Citizens' St. R. Co. v. Clark, 33 Ind. App. 190, 71 N. E. 53, 104 Am. St. 249; Hayne v. Union St. R. Co., 189 Mass. 551, 76 N. E. 219, 3 L. R. A. (N. S.) 605, 109 Am. St. 655; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. 592. The carrier is liable for rape of a passenger by an employé. Garvik v. Burlington Cedar Rapids & N. Ry. Co., 131 Iowa 415, 108 N. W. 327, 117 Am. St. 432. See, Neville v. Southern R. Co. (Tenn.), 146 S. W. 846, 40 L. R. A. (N. S.) 995, and very full note on liability of a carrier for the wilful torts of his servants to pasengers, 39 L. R. A. (N. S.) 999-1088.

[7] Louisville &c. R. Co. v. Grundy, 12 Ky. L. 293; Lucy v. Chicago G. W. R. Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551. Liability for humiliation of white woman passenger by conductor calling her a negro, May v. Shreveport Transp. Co., 127 La. 420, 53 So. 671, 32 L. R. A. (N. S.) 206. Liability for insulting act of employé in compelling white person to ride in car for negroes, Southern R. Co. v. Thurman, 121 Ky. 716, 90 S. W. 240, 28 Ky. L. 699, 2 L. R. A. (N. S.) 1108; Louisville &c. R. Co. v. Ritchel, 148 Ky. 701, 147 S. W. 411. As to insult, see Illinois Cent. R. Co. v. Fleming, 148 Ky. 473, 146 S. W. 1110.

[8] Where brakeman and station agent unjustifiedly arrested a passenger for bringing a dog on train (Hull v. Boston &c. R. Co., 210 Mass. 159, 96 N. E. 58, 36 L. R. A. (N. S.) 406), or where carrier's agent arrested passenger on false charge of larceny, Moore v. Louisiana &c. R. Co. (Ark.), 137 S. W. 826, 34 L. R. A. (N. S.) 299; Schmidt v. New Orleans R. Co., 116 La. 311, 40 So. 714, 7 L. R. A. (N. S.) 162. See, New York &c. R. Co. v. Waldron, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502.

[9] Bowden v. Atlantic Coast Line R. Co., 144 N. Car. 28, 56 S. E. 558, 12 Am. & Eng. Ann. Cas. 783.

colored passenger for protection as to the white.[10] If one is taken sick on the conveyance, the carrier owes him care commensurate to his needs in view of the facilities,[11] and if one unattended and so intoxicated as to be unable to take care of himself is accepted as a passenger, it is held that he must be given such special care as his condition requires.[12] The carrier must use care to protect passengers from contagious disease.[13] It has been held, however, that there is no duty on the part of the carrier's agents to assist persons to or from a train who are able to take care of themselves.[14]

§ 273. **Violation of the carrier's duties toward passenger considered as breach of contract, or as tort.**—The duties above considered are imposed upon the passenger carrier by law under the implied contract entered into with every passenger. However, since in no case is the carrier of passengers an absolute insurer that he will protect the passenger, but he contracts to use only a certain degree of care, in most respects a very high degree of care, he is liable only for negligence in failing to use the care demanded, and the question of the violation of these duties becomes one of negligence and largely one of tort, so that in the present article we shall content ourselves with setting out these duties generally, while into the question of personal injuries suffered by passengers we shall not at all enter, the object of this article being to consider the passenger carrier as such in his contract relation. It is well settled, however, that an action ex contractu may be brought in a proper case against a passenger carrier for personal injuries sustained or for the wrongful ejection from the carrier's conveyance, and a passenger suing for negligence may sue ex contractu, or ex delicto.[15]

[10] Richmond & D. R. Co. v. Jefferson, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. 87n.

[11] Central of Ga. R. Co. v. Madden, 135 Ga. 205, 69 S. E. 165, 31 L. R. A. (N. S.) 813 and note, 21 Am. & Eng. Ann. Cas. 1077 and note.

[12] Price v. St. Louis, I. M. & S. R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; Benson v. Tacoma R. & Power Co., 51 Wash. 216, 98 Pac. 605, 130 Am. St. 1096.

[13] Bogard's Admr. v. Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 36 L. R. A. (N S.) 337 and note.

[14] St. Louis, I. M. & S. R. Co. v. Green, 85 Ark. 117, 107 S. W. 168, 14 L. R. A. (N. S.) 1148; Illinois Cent. R. Co. v. Cruse, 123 Ky. 463, 96 S. W. 821, 8 L. R. A. (N. S.) 299; Illinois Cent. R. Co. v. Harper, 83 Miss. 560, 35 So. 746, 64 L. R. A. 283, 102 Am. St. 469.

[15] Aiken v. Southern R. Co.,

§ 274. Carrier's rules and regulations.—The carrier has the power to make reasonable rules and regulations for the conduct of its business. These enter into its contract, and the passenger is bound to comply with such as are not unreasonable, and not contrary to law.[16] The question of reasonableness is usually one of law.[17] It is sufficient if these regulations are brought to the passenger's notice by posting so that they may reasonably advise themselves, these regulations not being such a part of a contract that actual notice must be shown, but rather depending upon the carrier's power to control his business.[18] It is competent to exact payment of fare in advance, and on demand of an agent so empowered, the passenger must pay, or show a ticket indicating payment, and payment must be in legal tender if so required.[19] A tender of more than the amount, under the usages of business as to making change, is sufficient, but a tender of an amount so great as to be out of reasonable approximation is insufficient.[20]

118 Ga. 118, 44 S. E. 828, 98 Am. St. 107, and cases cited in note; Busch v. Interborough Rapid Transit Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

[16] Elliott R. R. (2d ed.), § 1576. See cases cited under note 87. Southern R. Co. v. Watson, 110 Ga. 681, 36 S. E. 209; Pennsylvania R. Co. v. Parry, 55 N. J. L. 551, 27 Atl. 914, 22 L. R. A. 251, 39 Am. St. 654; Eddy v. Rider, 79 Tex. 53, 15 S. W. 113; Norfolk & W. R. Co. v. Wysor, 82 Va. 250, 26 Am. & Eng. R. Cas. 234.

[17] Central of Ga. R. Co. v. Motes, 117 Ga. 923, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. 223 (holding reasonable a parol regulation forbidding sleeping in waiting rooms).

[18] Elliott R. R. (2d ed.), § 1576; Johnson v. Concord R. Corp. 46 N. H. 213, 88 Am. Dec. 199; Whitesell v. Crane, 8 Watts, & S. (Pa.) 369; Trotlinger v. East Tennessee R. Co., 11 Lea (Tenn.) 533; Louisville & N. R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; Gulf, C. & S. F. R. Co. v. Moody (Tex. Civ. App.), 30 S. W. 574.

[19] Elliott R. R. (2d ed.), § 1594; Pittsburg, C. &. St. L. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Van Dusan v. Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. 354n; Mahoney v. Detroit City R. Co., 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. 528; Jersey City &c. R. Co. v. Morgan, 52 N. J. L. 60, 18 Atl. 904; Peabody v. Oregon, R. & Nav. Co., 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823 and note. A coin is not deprived of its legal tender qualities merely by becoming worn in circulation, and a carrier must receive such a coin in payment of fare if not appreciably diminished in weight and it retains the appearance of a coin duly issued from the mint. Cincinnati Northern Tr. Co. v. Rosnagle, 84 Ohio St. 310, 95 N. E. 884, Ann. Cas. 1912C. 639, 35 L. R. A. (N. S.) 1030n.

[20] Burge v. Georgia, R. & El. Co., 133 Ga. 423, 65 S. E. 879; Barker v. Central Park &c. R. Co., 151 N. Y. 237, 45 N. E. 550, 56 Am. St. 626, 35 L. R. A. 489 (holding tender of five dollar bill for five cent fare not reasonable); Funderburg v. Augusta & A. R. Co., 81 S. Car. 141, 61 S. E. 1075, 21 L. R. A. (N. S.) 868; Knoxville Transp. Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A. (N. S.) 579, 10 Am. & Eng. Ann. Cas. 641 and note. The company is liable if the conductor does not re-

If, by mistake, the conductor accepts a smaller amount than required, it has been held that the passenger must correct the mistake on demand, or suffer ejection.[21] It has also been held to be the duty of a passenger, when a conductor approaches, to tender him tickets or money, and notify him of his destination.[22] If the passenger gets on the wrong train without fault of the carrier, but by his own mistake, he is not entitled to be carried to the next station without payment of fare.[23] If opportunity to purchase a ticket has been offered, the carrier may charge a sum in addition to the price of a ticket, not greater than the maximum allowed by law, where the passenger has not purchased a ticket before boarding,[24] and if the passenger has simply come to the station without time in which to buy a ticket he cannot say that he did not have reasonable opportunity, but must pay additional fare.[25] It has been held that a passenger may refuse to pay his fare until his baggage is checked.[26]

§ 275. **Ejection for failure to comply with regulations or because of faulty ticket.**—It is proper for the carrier to eject or exclude from a train or other vehicle one who has failed to comply with reasonable rules and regulations, including those above discussed.[27] Disorderly or obnoxious persons may be

turn the change. Gillespie v. Brooklyn &c. R. Co., 178 N. Y. 347, 70 N. E. 857, 102 Am. St. 503. A battered coin is a good tender. Cincinnati Northern Transp. Co. v. Rosnagle, 84 Ohio St. 310, 95 N. E. 884, 35 L. R. A. (N. S.) 1030n, Ann. Cas. 1912C. 639. A street railway may require a passenger to put nickels in an automatic collector. Martin v. Rhode Island &c. Co., 32 R. I. 162, 78 Atl. 548, 32 L. R. A. (N. S.) 695, Ann. Cas. 1912C. 1283.

[21] Curtis v. Louisville &c. R. Co., 94 Ky. 573, 15 Ky. L. 351, 23 S. W. 363, 21 L. R. A. 649; Wardwell v. Chicago &c. R. Co., 46 Minn. 514, 49 N. W. 206, 13 L. R. A. 596, 24 Am. St. 246.

[22] Chicago, St. L. & N. O. R. Co. v. Smith, 110 Tenn. 197, 75 S. W. 711, 100 Am. St. 799.

[23] Columbus, C. & Ind. Cent. R. Co. v. Powell, 40 Ind. 37; New York & N. E. R. Co. v. Feely, 163 Mass. 205, 40 N. E. 20; Missouri, K. & T. R. Co. v. Dawson, 10 Tex. Civ. App. 19, 29 S. W. 1106.

[24] Elliott R. R. (2d ed.), § 200; McGowen v. Morgan's &c. R. Co., 41 La. Ann. 732, 6 So. 606, 5 L. R. A. 817, 17 Am. St. 415; Zagelmeyer v. Cincinnati &c. R. Co., 102 Mich. 214, 60 N. W. 346, 47 Am. St. 514; Ammons v. Southern R. Co., 138 N. Car. 555, 51 S. E. 127, 3 Am. & Eng. Ann. Cas. 886 and note; Mills v. Missouri &c. R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497.

[25] Lake Erie & W. R. Co. v. Mayo, 4 Ind. App. 413, 30 N. E. 1106; Union Pac. R. Co. v. Wolf, 54 Kans. 592, 38 Pac. 786.

[26] Tarr v. Oregon Short Line R. Co., 14 Idaho 192, 93 Pac. 957, 125 Am. St. 151.

[27] Elliott R. R. (2d ed.), §§ 1575-1577a. See cases cited under notes 16, § 274 and note 87, § 270.

ejected or excluded.[28] One may be expelled who refuses to pay his fare or show a ticket, but reasonable opportunity to do so must be given first.[29] If the ticket offered does not entitle the holder to transportation at the time and on the train on which presented, he may, in a proper case, be expelled,[30] but if before steps are taken toward the ejection of a person for noncompliance with a rule as to paying fare or showing a ticket, he pays the fare, he cannot be ejected,[31] and if the passenger tenders the correct amount, and the conductor demands more, the passenger may recover damages, if ejected.[32]

One who has paid full fare may by misconduct render himself liable to expulsion.[33] If a parent refuses to pay fare for a child, both parent and child may be put off, though the parent has paid for himself.[34] If the conductor mistakenly expels a passenger, the carrier is liable.[35] After something has been done to stop a train in order to expel one, it is then too late for him to obtain the right to be carried by his payment of the fare.[36] Where one

[28] See cases cited in notes 25 to 28, § 267.

[29] Missouri, K. & T. R. Co. v. Smith, 152 Fed. 608, 81 C. C. A. 598, 10 Am. & Eng. Ann Cas. 939 and note; Southern R. Co. v. Fleming, 128 Ga. 241, 57 S E. 481, 10 Am. & Eng. Ann. Cas. 921; Anderson v. Louisville & N. R. Co., 134 Ky. 343, 120 S. W. 298, 20 Am. & Eng. Ann. Cas. 920 and note; Shelton v. Erie R. Co., 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. 704.

[30] Pennington v. Illinois Cent. R. Co., 252 Ill. 584, 97 N. E. 289, 37 L. R. A. (N. S.) 983; Terre Haute, A. & St. L. R. Co. v. Vanatta, 21 Ill. 188, 74 Am. Dec. 96; Post v. Chicago & N. W. R. Co., 14 Nebr. 110, 15 N. W. 225, 45 Am. Rep. 100; Melody v. Great Northern R. Co., 25 S. Dak. 606, 127 N. W. 543, 30 L. R. A. (N. S.) 568; Virginia & Southwestern R. Co. v. Hill, 105 Va. 729, 54 S. E. 872, 6 L. R. A. (N. S.) 899.

[31] Elliott R. R. (2d ed.), § 1637; Note to Am. & Eng. Ann. Cas. 939; Georgia S. & F. R. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53n; Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261.

[32] Curtis v. Louisville City R. Co., 94 Ky. 573, 15 Ky. L. 351, 23 S. W. 363, 21 L. R. A. 649; Adams v. Union R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

[33] Gould v. Chicago, M. & St. P. R. Co., 5 McCrary (U. S.) 502, 18 Fed. 155.

[34] Philadelphia, W. & B. R. Co. v. Hoeflick, 62 Md. 300, 50 Am. Rep. 223; Braun v. Northern Pac. R. Co., 79 Minn. 404, 82 N. W. 675, 984, 49 L. R. A. 319, 79 Am. St. 497.

[35] Atlanta Consol. St. R. Co. v. Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824; Georgia R. & Banking Co. v. Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. 490.

[36] Missouri, K. & T. R. Co. v. Smith, 152 Fed. 608, 10 Am. & Eng. Ann. Cas. 939 and note; Garrison v. United Railways &c. Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. 452; Mullins v. Illinois Central R. Co., 93 Miss. 184, 46 So. 529, 136 Am. St. 542; Behr v. Erie R. Co., 69 App. Div. (N. Y.) 416, 74 N. Y. S. 1007; Kirk v. Seattle Elec. Co., 58 Wash. 283, 108 Pac. 604, 1 L. R. A. (N. S.) 991 and note. But see Holt v. Hannibal &c. R. Co., 174 Mo. 524, 74 S. W. 631, affg. 87 Mo. App. 203.

conductor fails to give the passenger a receipt as evidence of payment of fare, and a second conductor expels him for the lack of such receipt, it is held that the carrier is liable, even though the second conductor was justified.[37] If the passenger has made a mistake as to his ticket, he must pay to prevent expulsion.[38] Under some holdings, if the ticket agent has made the mistake in furnishing the ticket, and the passenger cannot reasonably be charged with knowledge of such mistake, he may rely upon the agent's representations, and cannot be expelled lawfully.[39] If the passenger has paid a portion of the fare he has a right to its return before he can be expelled.[40]

One ejected from a train must not be put off in a dangerous manner, or at a dangerous place, and unnecessary force must not be used, and this rule has been incorporated into the statutes of many states.[41] If expulsion is necessary, reasonable and ordinary care must be used, and it has been held that one must be put off at a station.[42]

§ 276. Carrier's right to compensation.—Every contract rests upon a consideration, and the carrier of passengers as a consideration for his services has a right to a reasonable compensation.[43] In the case of the most important carriers today, the

[37] Scofield v. Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224; Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Appleby v. St. Paul City R. Co., 54 Minn. 169, 55 N. W. 1117, 40 Am. St. 308.

[38] Haggerty v. Flint & P. M. R. Co., 59 Mich. 366, 26 N. W. 639, 60 Am. Rep. 301.

[39] McDonald v. Central R. Co., 72 N. J. L. 280, 62 Atl. 405, 2 L. R. A. (N. S.) 505, 111 Am. St. 672; Contra, Shelton v. Erie R. Co., 73 N. J. L. 558, 9 Am. & Eng. Ann. Cas. 883; Memphis St. R. Co. v. Graves, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. 803; Olson v. Northern P. R. Co., 49 Wash. 626, 18 L. R. A. (N. S.) 209. But the company is not bound by a ticket agent's representations made after a ticket is sold. Pennington v. Ill. Cent. R. Co., 252 Ill. 584 97 N. E. 289, 37 L. R. A. (N. S.) 983. And see, Atchison &c. R. Co. v. Lucas (Tex.), 144 S. W. 1126, 39 L. R. A. (N. S.) 512.

[40] Burnham v. Grand Trunk R. Co., 63 Maine 298, 18 Am. Rep. 220; Wardwell v. Chicago, M. & St. P. R. Co., 46 Minn. 514, 49 N. W. 206, 13 L. R. A. 596, 24 Am. St. 246; Braun v. Northern Pac. R. Co., 79 Minn. 404, 82 N. W. 675, 984, 49 L. R. A. 319, 79 Am. St. 497.

[41] Elliott R. R., § 1637; Doggett v. Chicago, B. & I. R. Co., 134 Iowa 690, 112 N. W. 171, 13 L. R. A. (N. S.) 364n; Louisville &c. R. Co. v. Cottengim, 31 Ky. L. 871, 104 S. W. 280, 13 L. R. A. (N. S.) 624; State v. Kinney, 34 Minn. 311, 25 N. W. 705; Wright v. Union R. Co., 21 R. I. 554, 45 Atl. 548; Texas & P. R. Co. v. James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

[42] For cases arising under certain of these statutes, see 6 Cyc. 561.

[43] Johnson v. Pensacola &c. R. Co., 16 Fla. 623, 26 Am. Rep. 731; Spof-

amount of fare is regulated by statute, and if such regulation is reasonable and does not compel carriage at such a low rate as to be confiscation of property, or the taking of property without just compensation or due process of law, it is valid.[44] The rate may be fixed by usage,[45] in the absence of statute, or by contract between the passenger and the carrier. In the case of an interurban or street railway, the rate may be fixed by a contract between the railway company and the city, and if such a contract violates no law and is not contrary to public policy, it is binding between the parties, until the state interferes to modify the rates.[46] If there is a contract with a city that the rate of fare may not be changed without consent of both parties, it is not a change of the rate where a single fare is five cents, to discontinue selling six-ride tickets for twenty-five cents, for "rate of fare" means the unit or basic price, on which the total charge is based, in this case the rate for a single ride.[47] The carrier has no lien upon the passenger for a fare, which is a debt, and no right to detain him for its nonpayment.[48]

§ 277. **The ticket as a contract.**—A ticket is in many respects similar to the receipt or bill of lading given by the carrier of goods. It is a receipt in that it is evidence that the passenger has paid the fare demanded, from a place named therein to another place.[49] Fare is "the price of passage, or the sum paid or

ford v. Boston &c. R. Co., 128 Mass. 326; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72.

[44] St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452, affd. 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. 484; Commonwealth v. Interstate Consol. St. R. Co., 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973n, 2 Am. & Eng. Ann. Cas. 419, note 9 Am. & Eng. Ann. Cas. 1130; Stone v. Farmers' Loan &c. Co., 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334, 388, 1191, 23 Am. & Eng. R. Cas. 577; Georgia R. & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377, 35 Am. & Eng. R. Cas. 511. Where rates as to a particular carrier are not compensatory, and the carrier is operating at a loss, it may be relieved from the 2-cent a mile fare imposed by statute. Philadelphia & Reading R. Co. v. Phila. County, 228 Pa. St. 505, 77 Atl. 892.

[45] Spofford v. Boston & Maine R. Co., 128 Mass. 326.

[46] Manitowoc v. Manitowoc &c. R. Co., 145 Wis. 13, 129 N. W. 925, 14 Am. St. 1056.

[47] Philadelphia v. Phila. Rapid Tr. Co., 228 Pa. St. 325, 77 Atl. 501, 21 Am. & Eng. Ann. Cas. 87.

[48] Lynch v. Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141.

[49] Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 260, citing many cases; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469;

to be paid for carrying the passenger."[50] The ticket is evidence that a contract has been entered into,[51] but the contract is one implied by law except as it is expressed in the ticket, and parol evidence has often been held admissible to prove the terms of the contract entered into between the carrier's agent and the passenger, and the representations made by the agent.[52] Yet the terms of the contract, or certain conditions which form a part of the contract, are often printed on the ticket, and, in such cases, it seems that the better rule is that a passenger has no right to rely upon representations of an agent contrary to its express conditions.[53] A ticket is not negotiable like commercial paper, though it is transferable, unless otherwise provided, and a bona fide purchaser of a stolen or fraudulently obtained ticket does not thereby get title.[54] The purchaser of a through ticket is entitled to travel by the usual route, and not by another way owned by the same company.[55] A ticket for traveling in one direction is not good for passage in the opposite direction.[56] That a ticket has been issued for passage between two points does not necessarily imply that all the company's passenger trains stop at both stations,

O'Rourke v. Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614.

[50] Chase v. New York Cent. R. Co., 26 N. Y. 523.

[51] It is held that a ticket is only evidence of the contract and not the contract itself. Aiken v. Southern R. Co., 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. 107; Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261, and cases cited.

[52] Louisville & Nashville R. Co. v. Scott, 141 Ky. 538, 133 S. W. 800, 34 L. R. A. (N. S.) 206; Hayes v. Wabash R. Co., 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229 and note; Illinois Cent. R. Co. v. Harper, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469; Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 74 N. E. 179, 106 Am. St. 597, 3 Am. & Eng. Ann. Cas. 3; Smith v. Southern R. Co., 88 S. Car. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708. See cases cited in note 51, § 277.

[53] Elliott R. R. (2d ed.), § 1593; Ames v. Southern Pac. R. Co., 141 Cal. 728, 75 Pac. 310, 99 Am. St. 98; Walker v. Price, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392; McClure v. Phila. &c. R. Co., 34 Md. 532, 6 Am. Rep. 345; Pennington v. Phila. &c. R. Co., 62 Md. 95; Boice v. Hudson River R. Co., 61 Barb. (N. Y.) 611.

[54] Frank v. Ingalls, 41 Ohio St. 560, 21 Am. & Eng. R. Cas. 277; Levinson v. Texas &c. R. Co., 17 Tex. Civ. App. 617, 43 S. W. 901.

[55] Milroy v. Chicago, M. & St. P. R. Co., 98 Iowa 188, 67 N. W. 276; Bennett v. New York Cent. &c. R. Co., 69 N. Y. 594, 25 Am. Rep. 250. But where the carrier has two routes and the passenger does not know of the rule that she must go by direct route, and where the former conductor and the ticket agent told her she was on the right route, she is not bound by the rule. Illinois Cent. R. Co. v. Harper, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469.

[56] Ohio & M. R. Co. v. Swarthout, 67 Ind. 567, 33 Am. Rep. 104; Die-

and it is the passenger's duty to ascertain whether a certain train stops before he takes passage.[57]

§ 278. **Conclusiveness of ticket.**—The cases are decidedly in conflict on this question. It has been shown that many cases hold that oral evidence is admissible to show representations of the agent which entered into the real contract, but that others hold that as between a conductor and passenger the ticket is conclusive for the time being. It seems that the weight of recent authority would uphold the following statements, although there are opposite holdings. If a ticket is in form a mere check or token, valid on its face, obtained from an authorized agent, and the passenger is not at fault, he cannot be ejected because the ticket does not comply with some unknown regulation of the carrier.[58] Where a ticket is not valid on its face, the passenger has a right of action against the carrier in breach of contract for selling him such invalid ticket, but as between him and the conductor, his proper course is to pay fare or he must suffer expulsion.[59] It is said that the reason for this is the impossibility of operating railways in any other manner with a due regard to the safety and convenience of the public, and the proper security of the company in collecting fares.[60] On the other hand, it is very frequently the case that a passenger on a train does not carry with him sufficient money to pay fare when he has already pur-

trich v. Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711. Compare Illinois Cent. R. Co. v. Harper, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469.

[57] Ohio & M. R. Co. v. Swarthout, 67 Ind. 567, 33 Am. Rep. 104; Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611; Logan v. Hannibal & St. J. R. Co., 77 Mo. 663; Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711. But see Illinois Cent. R. Co. v. Harper, 83 Miss 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469.

[58] Elliott R. R., § 1594a; Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Hufford v. Grand Rapids &c. R. Co., 53 Mich. 118, 48 N. W. 580; New York &c. R. Co. v. Winter's Admr., 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. 356; Dissenting opinion, Indianapolis St. R. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261.

[59] Elliott R. R., § 1594, and cases cited; Kiley v. Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. 410; Illinois Cent. R. Co. v. Fleming, 148 Ky. 473, 146 S. W. 1110; Frederick v. Marquette, H. & O. R. Co., 37 Mich. 342, 9 L. R. A. 132n, 26 Am. Rep. 531; Shelton v. Erie R. Co., 73 N. J. L. 558, 66 Atl. 403, 118 Am. St. 704, 9 Am. & Eng. Ann. Cas. 883; McKay v. Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. 913, 44 Am. & Eng. R. Cas. 395.

[60] Pouilin v. Canadian Pac. R. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800.

chased what he believes to be a sufficient ticket, and he may be put to great hardship because of ejection, and mistakes on the part of ticket agents are not infrequent, and many courts, moved by these considerations, hold that, especially if the ticket is made apparently invalid by punching or stamping, or other fault of the ticket agent, and the passenger has not been at fault, the conductor must heed a reasonable explanation, and not expel the passenger, and it must be said that this rule has strong reasons for its support, though its working would present some difficulties to the carrier.[61] It is held that as to limitation of liability the passenger is not bound by conditions printed on the back of the ticket which he did not know of and to which his attention was not directed.[62] But since any limitation of liability must be supported by consideration, usually a reduced fare,[63] it is held that the passenger who pays a reduced fare has sufficient notice that the carrier's liability may have been restricted by the ticket.[64] Where a ticket is of doubtful import or ambiguous, it is construed most strongly against the carrier.[65]

§ 279. Loss of ticket.—Since a ticket is generally the only evidence to the conductor of the passenger's rights, or at least the best evidence, he must produce it whenever called upon, in order to prevent impositions upon the carrier, and if he has no

[61] Georgia R. & Banking Co. v Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. 499; Cleveland, C. C. & St. L. R. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261, 2 L. R. A. (N. S.) 695. See Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 109 Am. St. 830. For instance of humiliation see Ill. Cent. R. Co. v. Fleming (Ky.), 146 S. W. 1110. See cases cited under note 39, § 275. See cases cited in note 9, § 285. For a review of the recent cases as to the right of the carrier to eject a passenger holding a ticket invalid through the carrier's fault, and showing that the weight of recent authority holds that the passenger may recover damages for ejection, see note to Melody v. Great Northern R. Co., 25 S. Dak. 606, 127 N. W. 543, Ann. Cas. 1912C. 727.

[62] Little Rock &c. R. Co. v. Record, 74 Ark. 125, 85 S. W. 421, 109 Am. St. 67; Hutchens v. Pennsylvania R. Co., 181 N. Y. 186, 73 N. E. 972, 100 Am. St. 537.

[63] Southern R. Co. v. De Laussure, 116 Ga. 53, 42 S. E. 479; Bullock v. Delaware, L. & W. R. Co., 60 N. J. L. 24, 36 Atl. 773, 37 L. R. A. 417; Watson v. Louisville & N. R. Co., 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454.

[64] Elliott v. Southern Pac. R. Co., 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393; Watson v. Louisville & N. R. Co., 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454.

[65] Ann Arbor R. Co. v. Amos (Ohio), 97 N. E. 978.

ticket, it makes no difference that he has lost, mislaid or forgotten one, and, if he cannot produce it, he cannot show by parol that he had one or purchased one,[66] and must pay fare or suffer expulsion,[67] though if lost in the conveyance, a reasonable time must be given to find it.[68] A regulation that a passenger must surrender his ticket is reasonable, and if a check or some evidence of his right to be on the train would be given him in return, for failure to surrender it he may be expelled.[69] So if the passenger has paid cash fare, and has been given a train ticket or rebate ticket, he must produce this when demanded.[70] Though where a ticket is so imperfect in appearance that a conductor is not justified in considering it evidence of the payment of fare, he may refuse to accept it in lieu of fare, yet where a ticket is in fact good, and merely soiled or changed in its general appearance, as where the color had faded because of water, and the passenger explains such conditions satisfactorily, the carrier is liable for wrongful expulsion, and the rule, in many jurisdictions at least, is that if the ticket is only apparently bad, the conductor must heed the reasonable explanations of the passenger.[71]

§ 280. Stop-over privileges.—A through ticket does not give stop-over privileges, unless it is specially provided in the

[66] Downs v. New York &c. R Co., 36 Conn. 287, 4 Am. Rep. 77; Harp v. Southern R. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. 212; Chicago & Alton R. Co. v. Willard, 31 Ill. App. 435; Frederick v. Marquette &c. R. Co., 37 Mich. 342, 26 Am. Rep. 531; Monnier v. New York Central &c. R. Co., 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619. Compare, Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830;

[67] Harp v. Southern R. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. 212; Shelton v. Erie R. Co., 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. 704; Monnier v. New York &c. R. Co., 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619.

[68] Maples v. New York &c. R. Co., 38 Conn. 557, 9 Am. Rep. 434; South Carolina R. Co. v. Nix, 68 Ga. 572; Louisville &c. R. Co. v. Maybin, 66 Miss. 83; Robson v. New York Cent. R. Co., 21 Hun (N. Y.) 387; Louisville &c. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347; International &c. R. Co. v. Wilkes, 68 Tex. 617.

[69] Havens v. Hartford & N. H. R. Co., 28 Conn. 69; White v. Evansville &c. R. Co., 133 Ind. 480, 33 N. E. 273; State v. Thompson, 20 N. H. 250.

[70] Louisville, N. A. & C. R. Co. v. Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890.

[71] Chicago & E. I. R. Co. v. Conley, 6 Ind. App. 9, 32 N. E. 96, 865; Illinois Cent. R. Co. v. Gortikov, 90 Miss. 787, 45 So. 363, 14 L. R. A. (N. S.) 464n, 122 Am. St. 324; Smith v. Southern R. Co., 88 S. Car. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708.

ticket.[72] Where an authorized agent has misled a passenger as to stop-over privileges, or has agreed to give them to him, the carrier may be liable for refusing to allow them, or for collecting additional fare to carry the passenger to his destination.[73] In the case of through tickets sold by the first carrier over connecting lines as well as his own, the passenger is not required to travel continuously over all the lines but is required to travel continuously over any one of the particular roads after he has begun his journey on that road,[74] and if there is a time for the beginning of his journey over any connecting carrier's route, he must begin the journey with that carrier before the expiration of the time limit.[75] In other respects his situation as to each of the carriers is practically the same as if he had purchased a separate ticket from each of them, and he does not need to make a continuous journey over the whole route. A railroad company selling a through ticket may by express or implied contract make itself liable for the safe carriage of a passenger over the entire route, but the mere sale of such a ticket does not of itself show such a contract, and the presumption from such sale is that the selling carrier is the agent of connecting carriers.[76] Such tickets are assignable if there are not stipulations to the contrary,[77] but

[72] Roberts v. Koehler, 30 Fed. 94; Keeley v. Boston & Maine R. Co., 67 Maine 163, 24 Am. Rep. 19 and note; Cheney v. Boston &c. R. Co., 11 Metc. (Mass.) 121, 45 Am. Dec. 190 and note; Coleman v. New York & N. H. R. Co., 106 Mass. 160; Pennsylvania R. Co. v. Parry, 55 N. J. L. 551, 27 Atl. 914, 22 L. R. A. 251, 39 Am. St. 654; Louisville & N. R. Co. v. Klyman, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. 755.

[73] Burnham v. Grand Trunk R. Co., 63 Maine 298, 18 Am. Rep. 220; Tarbell v. Northern Cent. R. Co., 24 Hun (N. Y.) 51; Young v. Penna. R. Co., 115 Pa. St. 112, 7 Atl. 741; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. 356.

[74] Knight v. Portland &c. R. Co., 56 Maine 234, 96 Am. Dec. 449; Brooke v. Grand Trunk R. Co., 15 Mich. 332; Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830; Brian v. Oregon Short Line R. Co., 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Am. & Eng. Ann. Cas. 311 and note; Auerbach v. New York Cent. R. Co., 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334.

[75] Pennsylvania R. Co. v. Hine, 41 Ohio St. 276; Gulf, C. & S. F. R. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. 787; 52 Am. & Eng. R. Cas. 197.

[76] Kansas City, M. & B. R. Co. v. Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. 25; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238, 18 Am. & Eng. R. Cas. 339; Hartan v. Eastern R. Co., 114 Mass. 44; Pennsylvania R. Co. v. Loftus, 72 Ohio St. 288, 74 N. E. 179, 106 Am. St. 597, 3 Am. & Eng. Ann. Cas. 3 and note.

[77] Nichols v. Southern Pac. R. Co., 23 Ore. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. 664.

their assignability is usually regulated by contract.[78] If the ticket stipulates for a continuous trip, the conductor has no right to allow stop-overs.[79]

§ 281. Time limitations.—A railroad company, in the absence of statute preventing, may reasonably limit the time within which a ticket over its road shall be good,[80] and within this qualification it may be limited to a single day,[81] or particular train.[82] A limited ticket is not good after the time of limitation has expired, if the limitation is reasonable and if the carrier has furnished the necessary facilities for completing the journey within the stipulated time.[83] It seems that a time limitation is not good unless actually brought to the notice of the passenger, and this may not be done by public notice in a station, nor, it seems, merely by a limitation written or printed on the back of a ticket, where the passenger accepts the ticket but does not notice the limitation.[84] Some courts, however, regard the limitation of time as merely a regulation of the carrier, of which the passenger is bound to take notice,[85] but the better rule seems to be that it is a matter of contract, and the passenger must have expressly or impliedly consented in order to be bound. The limitation is construed most strongly against the carrier, and is held to apply to

[78] Granier v. Louisiana &c. R. Co., 42 La. Ann. 880, 8 So. 614; Cody v. Central Pac. R. Co., 4 Sawy. (U. S.) 114, Fed. Cas. No. 2940; Drummond v. Southern Pac. R. Co., 7 Utah 118, 25 Pac. 733.

[79] Sanden v. Northern Pac. R. Co., 43 Mont. 209, 115 Pac. 408, 34 L. R. A. (N. S.) 711n.

[80] Elliott v. Southern Pac. R. Co., 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393; Greeman v. Atchison &c. R. Co., 71 Kans. 327, 80 Pac. 592, 6 Am. & Eng. Ann. Cas. 118 and note; Rawitzky v. Louisville &c. R. Co., 40 La. Ann. 47, 3 So. 387; Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. 452; Brian v. Oregon Short Line R. Co., 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Am. & Eng. Ann. Cas. 311.

[81] Freeman v. Atchison, T. & S. F. R. Co., 71 Kans. 327, 80 Pac. 592, 6 Am. & Eng. Ann. Cas. 118 and note; McClure v. Philadelphia &c. R. Co., 34 Md. 532, 6 Am. Rep. 345; State v. Campbell, 32 N. J. L. 309; Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617; Gale v. Delaware &c. R. Co., 7 Hun (N. Y.) 670.

[82] See cases cited in note 1, § 283; Elliott R. R., § 1598.

[83] Freeman v. Atchison, T. & S. F. R. Co., 71 Kans. 327, 80 Pac. 592, 6 Am. & Eng. Ann. Cas. 118n; Rawitzky v. Louisville &c. R. Co., 40 La. Ann. 47, 3 So. 387; Boling v. St. Louis & S. F. R. Co., 189 Mo. 219, 88 S. W. 35; State v. Campbell, 32 N. J. L. 309.

[84] Elliott R. R. (2d ed.), §§ 1596-1598; Norman v. Southern R. Co., 65 S. Car. 517, 44 S. E. 83, 95 Am. St. 809; Louisville & N. R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

[85] Coburn v. Morgan's Louisiana &

the time of beginning the journey and not to the time of completion, and if the journey is begun before midnight of the day on which the limitation expires, it makes no difference that it is not completed until after that time.[86] If there is no express limitation of time, the statute of limitations will govern.[87]

§ 282. Transfer of tickets—Nontransferable tickets.—In the absence of anything to the contrary, a ticket is transferable.[88] Nontransferable tickets based on reduced rates may be sold, and often limited nontransferable tickets are sold, the purchaser of which cannot transfer any rights thereunder.[89] By express provisions, the ticket may be made nontransferable, or void if presented by one other than the original holder, or the mere use of a word such as nontransferable may be sufficient to restrict the right to use to the first purchaser.[90] So if a ticket is issued in the name of one person, the conductor may refuse to honor it when presented by another, even if it was really purchased for that other.[91] It has been held that one who presents a nontransferable ticket issued to another, without any attempt at concealment, is entitled to the same care as any other passenger if such ticket has been accepted,[92] and also that a conductor may not refuse to

T. R. Co., 105 La. 398, 29 So. 882, 83 Am. St. 242; Johnson v. Concord R. Co., 46 N. H. 213, 88 Am. Dec. 199.

[86] Cleveland, C. C. & St. L. R. Co. v. Kinsley, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. 245; Auerbach v. New York Central R. Co., 89 N. Y. 281, 42 Am. Rep. 290; Rutherford v. St. Louis & S. W. R. Co., 28 Tex. Civ. App. 625, 67 S. W. 161. But it is held that if the provision is that the ticket must be "used to destination" before a certain date, the journey must be completed before that time. Brian v. Oregon Short Line R. Co., 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Am. & Eng. Ann. Cas. 311.

[87] Freeman v. Atchison, T. & S. F. R. Co., 71 Kans. 327, 80 Pac. 592, 6 Am. & Eng. Ann. Cas. 118 and note; Cassiano v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.), 82 S. W. 806.

[88] Denver &c. R. Co. v. Derry, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761; Carsten v. Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. 589; Nichols v. Southern Pac. R. Co., 23 Ore. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. 664; Hudson v. Kansas Pac. R. Co., 3 McCrary (U. S.) 249, 9 Fed. 879.

[89] Langdon v. Howells, L. R. 4 Q. B. Div. 337; Kirby v. Union Pac. R. Co., 51 Colo. 509, 119 Pac. 1042; Way v. Chicago &c. R. Co., 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431; Post v. Chicago & N. W. R. Co., 14 Nebr. 110, 15 N. W. 225, 45 Am. Rep. 100, 9 Am. & Eng. R. Cas. 345; Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. 452.

[90] See cases cited in note 89 above. Granier v. Louisiana &c. R. Co., 42 La. Ann. 880, 8 So. 614; Drummond v. Southern Pac. R. Co., 7 Utah 118, 25 Pac. 733.

[91] Chicago & Northwestern R. Co. v. Bannerman, 15 Ill. App. 100.

[92] Robostelli v. New York &c. R. Co., 33 Fed. 796, 34 Am. & Eng. R.

honor a nontransferable ticket in the hands of one not the original purchaser, and at the same time take the same up and keep it, unless he has such right by contract.[93] Though a state statute may prevent ticket brokerage or scalping, and such statutes are valid,[94] yet it has been held that where a traveler purchased a ticket with no restrictions as to assignability, he may maintain an action in one state for refusal to carry him on such ticket, although in that state it is unlawful for one not an authorized agent to sell tickets.[95] Where a passenger presents a nontransferable ticket, the carrier may require him to identify himself by writing his signature for comparison with the signature written on the ticket, and, if this is not satisfactory, to produce other proof, but only reasonably satisfactory proof of identity can be required, the conductor not being an absolute arbiter.[96]

A railroad company is not obliged by the common law to sell mileage or commutation tickets, but under certain authorities, if the company has been accustomed to sell such tickets to the public, it cannot discriminate and refuse to sell to a particular individual under the circumstances and conditions upon which they are usually sold.[97] If there is a time limitation, the portion of the mileage ticket not used before the expiration of such time is not good.[98]

§ 283. **Excursion tickets and round-trip tickets.**—It is held that an excursion ticket is exclusive evidence of the terms

Cas. 515. See La Gascogne, 135 Fed. 577. See Denver &c. R. Co. v. Berry, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761.

[93] Post v. Chicago &c. R. Co., 14 Nebr. 110, 15 N. W. 225, 45 Am. Rep. 100; Drummond v. Southern Pac. R. Co., 7 Utah 118, 25 Pac. 733.

[94] Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. 329, 10 Lewis Am. R. & Corp. 451 and note; Smalley v. Atlanta & C. A. L. R. Co., 73 S. Car. 572, 53 S. E. 1000, 6 Am. & Eng. Ann. Cas. 868 and note.

[95] Sleeper v. Pennsylvania R. Co., 100 Pa. St. 259, 45 Am. Rep. 380, 9 Am. & Eng. R. Cas. 291.

[96] Marlow v. Southern Pac. R. Co. (Cal.), 121 Am. St. 127, 90 Pac. 928; Southern &c. R. Co. v. Hamilton, 54 Fed. 468; Southern R. Co. v. Barlow, 104 Ga. 213, 30 S. E. 732, 69 Am. St. 166; Baltimore &c. R. Co. v. Hudson, 117 Ky. 995, 80 S. W. 454, 25 Ky. L. 2154; Southern R. Co. v. Cassell, 28 Ky. L. 1230, 92 S. W. 281. See also, Pittsburg &c. R. Co. v. Coll, 37 Ind. App. 232, 76 N. E. 816.

[97] State v. Delaware &c. R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543, 23 Am. & Eng. R. Cas. 470; Larrison v. Chicago &c. R. Co., 1 Int. Com. 369.

[98] Sherman v. Chicago &c. R. Co., 40 Iowa 45; Lillis v. St. Louis, K. C. & N. R. Co., 64 Mo. 464, 27 Am. Rep. 255; Powell v. Pittsburg, Cincinnati & St. L. R. Co., 25 Ohio St. 70.

of the contract, and the advertisements of the excursion are not admissible to vary its terms.[99] Such a ticket especially may be limited to a special train, or particular day,[1] but must not be limited for return so that a passenger using due diligence cannot commence his return in time.[2] In the absence of limitation or notice to the contrary when purchased, a round-trip excursion ticket is good until used,[3] and if the purchaser has used it in making the journey one way and then transfers it, it is good in the holder's hands, unless there is a limitation as to transfer.[4]

§ 284. **Mutilated tickets—Showing ticket before admission to train.**—A mutilated ticket is one which is deprived of some essential part; where a ticket is torn into two pieces, if both are presented to the conductor at the same time and no fraud is intended, the ticket is good.[5] A condition that a coupon ticket is void if detached is valid and reasonable, but must be sensibly and reasonably construed, and the right to passage can not be refused where it is detached by accident or inadvertence, and is presented with the balance of the ticket of which it forms a part.[6] A railroad company has the power to require a passenger to show his ticket to a gate keeper before getting on the train, and any person having notice of such a regulation and a reasonable opportunity to comply therewith must observe it, and may be prevented by force from its violation.[7]

§ 285. **Transfers.**—Street car companies frequently use transfer checks, and are held to the duty to furnish proper ones.

[99] Howard v. Chicago, St. L. & N. O. R. Co., 61 Miss. 194, 18 Am. & Eng. R. Cas. 313.

[1] Pennington v. Philadelphia &c. R. Co., 62 Md. 95, 18 Am. & Eng. R. Cas. 310; McRae v. Wilmington &c. R. Co., 88 N. Car. 526, 43 Am. Rep. 745, 18 Am. & Eng. R. Cas. 316.

[2] Texas & P. R. Co. v. Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400. See on excursion tickets, Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830.

[3] Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142, 23 Am. & Eng. R. Cas. 672. See also, Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830.

[4] Carsten v. Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. 589.

[5] Young v. Central of Ga. R. Co., 120 Ga. 25, 47 S. E. 556, 65 L. R. A. 436, 102 Am. St. 68.

[6] Fairfield v. Louisville & N. R. Co., 94 Miss. 887, 48 So. 513, 136 Am. St. 611, 19 Am. & Eng. Ann. Cas. 456 and note.

[7] Northern Cent. R. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449, 16 L. R.

A regulation requiring a check where fare is paid on one line and transfer permitted to another is valid and reasonable, and one who enters a car at a different time or place from that specified in the transfer check must pay fare or suffer expulsion.[8] The better rule is that if a carrier's agent makes a mistake in giving a transfer, such mistake is not binding on the passenger, and the passenger is not bound to see that the proper transfer is given, since a transfer is merely a token and not conclusive evidence.[9] The contrary rule, however, holds in certain jurisdictions.[10] The street car conductor in punching transfers is by the former rule held to act as the agent of the company in the relation of a ticket seller, and his representations bind the company.[11] If the transfer is not required by statute or ordinance, but is merely given from custom, it is binding on the company,[12] and a condition that if there is a controversy with the conductor over the transfer the passenger must pay fare, and call on the company to settle the difficulty, is unreasonable.[13] A passenger, however, cannot refuse to pay his fare until a transfer is given, though by experience he believes that he otherwise would not get one until after his transfer point was passed.[14]

A. 449, 35 Am. St. 422; Dickerman v. St. Paul &c. R. Co., 44 Minn. 433, 46 N. W. 907.

[8] Heffron v. Detroit City R. Co., 92 Mich. 406, 52 N. W. 802, 16 L. R. A. 345, 31 Am. St. 601; Percy v. Metropolitan St. R. Co., 58 Mo. App. 75.

[9] Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261 and cases cited; Morrill v. Minneapolis St. R. Co., 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341 (a strong case); Arnold v. Rhode Island Co., 28 R. I. 118, 66 Atl. 60, 125 Am. St. 721; Memphis St. R. Co. v. Graves, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. 803; Citizens' St. R. Co. v. Clark, 33 Ind. App. 190, 71 N. E. 53, 104 Am. St. 249. See Montgomery Tract. Co. v. Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851n.

[10] Garrison v. United Rys. & Electric Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. 452; Norton v. Consol. R. Co., 79 Conn. 109, 63 Atl. 1087, 118 Am. St. 132, 6 Am. & Eng. Ann. Cas. 943; Hornesby v. Georgia R. & E. Co., 120 Ga. 913, 48 S. E. 339, 1 Am. & Eng. Ann. Cas. 391 and note. Dissenting opinion, Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261, and cases cited. See Little Rock &c. R. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97.

[11] Georgia R. & Elec. Co. v. Baker, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. 246; Chicago &c. Transp. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287, 114 Am. St. 352.

[12] Georgia R. & Electric Co. v. Baker, 125 Ga. 562, 54 S. E. 639, 114 Am. St. 246.

[13] Georgia R. & Electric Co. v. Baker, 125 Ga. 562, 54 S. E. 639, 114 Am. St. 246.

[14] Louisville R. Co. v. Hutti, 141 Ky. 511, 133 S. W. 200.

§ 286. Limitation of liability by contract—Where one travels on pass.—Generally, passes are issued with a stipulation limiting the carrier's liability. Conditions in passes that the person to whom they are issued must do a certain thing before he may ride or must conduct himself in a certain way while being carried are valid, if not in contravention of public policy or of statute, and the person traveling on the pass is bound to comply, as where it is required that the pass must be signed,[15] or that a drover shall remain in the caboose while the train is in motion.[16] Many passes contain a stipulation in terms exempting the carrier from liability for negligence, and the rule in many jurisdictions is that such a limitation is void.[17] There are, however, many other authorities which, with much reason, hold to the contrary in the case of a gratuitous pass.[18] It is said that one may not contract to exempt himself from liability for future negligence, since such a contract is against public policy,[19] but the reasoning of the contrary cases is that a carrier, when it issues a pass gratuitously and thus does something which the law does not require it to do, may stipulate against liability for negligence without contravening principles of public policy.[20] Cer-

[15] Elliott v. Western & A. R. Co., 58 Ga. 454.

[16] Ft. Scott, W. & W. R. Co. v. Sparks, 55 Kans. 288, 39 Pac. 1032. But the conductor may waive compliance. Leslie v. Atchison, T. & S. F. R. Co., 82 Kans. 152, 107 Pac. 765, 27 L. R. A. (N. S.) 646.

[17] St. Louis &c. R. Co. v. Pitcock, 82 Ark. 441, 101 S. W. 725, 118 Am. St. 84, 12 Am. & Eng. Ann. Cas. 582; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253; Doyle v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. 335, 25 L. R. A. 157; Yazoo & M. V. R. Co. v. Grant, 86 Miss. 565, 38 So. 502, 109 Am. St. 723, 4 Am. & Eng. Ann. Cas. 556; Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Chattanooga Rapid Transit Co. v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; Galveston, H. & S. A. R. Co. v. Bean, 45 Tex. Civ. App. 52, 99 S. W. 721; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627. See Elliott R. R. (2d ed.), § 1608; Walther v. Southern Pac. R. Co., 159 Cal. 769, 116 Pac. 51, 37 L. R. A. (N. S.) 235 and note.

[18] See Elliott R. R. (2d ed.), § 1608. See note 37 L. R. A. (N. S.) 235; Dugan v. Blue Hill St. R. Co., 193 Mass. 431, 79 N. E. 748; Ulrich v. New York &c. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. 369; Marshall v. Nashville, R. &c. Co., 118 Tenn. 254, 9 L. R. A. (N. S.) 1246; Muldoon v. Seattle &c. R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 28 Am. St. 901, 9 Lewis Am. Rep. & Corp. 715 and note.

[19] Mobile & O. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Louisville, N. A. & C. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Carroll v. Missouri R. Co., 88 Mo. 239, 57 Am. Rep. 382.

[20] Quimby v. Boston &c. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Muldoon v. Seattle &c. R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A.

tain kinds of passes cannot be held to have been issued gratuitously, for there has been a consideration of some kind for their issuance, as in the instance of a drover's pass,[21] and the one riding on such a pass is a passenger for hire.

If a person presents a pass which was not issued to him, it is a fraud upon the carrier, and the carrier owes such a one no duty save not wilfully to injure him.[22] Where a railroad has made a contract to give passes which is based on a valid consideration, as to landowners in return for a right of way, such contracts will usually be upheld.[23] As a rule, such a covenant will not run with the land, so as to be binding upon the successors of the railroad company.[24]

The interstate commerce act prohibits carriers engaged in interstate commerce from issuing free passes except to certain persons, and is strictly enforced.[25] Certain states, by statute or by their constitutions, forbid the issuance of passes to certain persons.[26] It seems that it would be proper to contract that the holder of a pass should have no right to be carried in a parlor or sleeping car, but if the pass is silent, the person traveling on it may, it seems, have the right to be carried in such cars upon

794, 28 Am. St. 901, 9 Lewis Am. R. & Corp. 715 and note. It was held in a recent federal case that whether a waiver of liability for injuries printed on the back of a pass is a valid defense to an action for injuries caused by negligence depends on the law of the place where the injury occurred. Smith v. Atchison &c. R. Co., 194 Fed. 79.

[21] Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Blatcher v. Philadelphia &c. R. Co., 31 App. (D. C.) 385, 16 L. R. A. (N. S.) 991; Delaware, L. & W. R. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 368; Weaver v. Ann Arbor R. Co., 139 Mich. 590, 102 N. W. 1037, 5 Am. & Eng. Ann. Cas. 764 and note; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627.

[22] Harmon v. Jensen, 176 Fed. 519, 20 Am. & Eng. Ann. Cas. 1224 and note; Fitzmaurice v. New York, N. H. & H. R. Co., 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, 116 Am. St. 236, 7 Am. & Eng. Ann. Cas. 586 and note.

[23] Elliott R. R. (2d ed.), § 1611; Western Maryland R. Co. v. Lynch, 82 Md. 233, 34 Atl. 40; Dodge v. Boston &c. R. Co., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318, 32 Am. Rep. 451.

[24] Ruddick v. St. Louis, K. & N. R. Co., 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570, 57 Am. & Eng. R. Cas. 290; Dichey v. Kansas City &c. R. Co., 122 Mo. 223, 26 S. W. 685; Martin v. New York, S. & W. R. Co., 36 N. J. Eq. 109, 12 Am. & Eng. R. Cas. 448; Eddy v. Hinnant, 82 Tex. 354, 18 S. W. 562.

[25] Ex parte Kohler, 31 Fed. 315, 1 Int. Com. 317, 29 Am. & Eng. R. Cas. 44; In re Boston &c. R. Co., 5 Int. Com. 69; Slater v. N. Pac. R. Co., 2 Int. Com. 359.

[26] State v. Martyn, 82 Nebr. 225, 17 Am. & Eng. Ann. Cas. 659 and note: People v. Rathbone, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384. See Mul-

paying the compensation for such carriage.[27] Unless there is a condition in a pass in reference to the baggage of the one using it, he has a right to have his baggage carried like a passenger for hire, but the liability is that of a gratuitous bailee,[28] and the carrier may limit the right by stipulations in the pass, and probably by rules and regulations.[29]

§ 287. **Limitation of liability where fare paid.**—Liability may not be limited by mere notice, nor ordinarily at least, by mere rules or regulations of the company.[30] But one who has accepted a ticket which is in form a contract upon its face is presumed to have assented to it, and to have agreed to be carried according to the just and reasonable terms of the ticket, in the absence of fraud or imposition.[31] The carrier may not contract against liability from his own or his servant's negligence where the carriage is for an actual consideration, as where cash is paid, or a pass issued for a consideration even though a reduced rate was given.[32] It has been held, however, that it may contract against such liability in the case of express messengers, unless

doon v. Seattle &c. R. Co., 10 Wash. 311, 38 Pac. 995, 22 L. R. A. 794, 45 Am. St. 787 (holding that where one accepts a pass, issuance of which is prohibited by law, he is estopped from questioning the validity of its conditions, which would be taking advantage of his own wrong). Where by statute a carrier must transport an accepted gratuitous passenger with ordinary care, it is liable for failure in such duty even to one riding on a pass given contrary to law. John v. Northern Pac. R. Co., 42 Mont. 18, 111 Pac. 632, 32 L. R. A. (N. S.) 85.

[27] Elliott R. R. (2d ed.), § 1614; Lawrence v. Pullman Co., 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58; Muldoon v. Seattle City R. Co., 10 Wash. 311, 38 Pac. 995, 22 L. R. A. 794, 45 Am. St. 787.

[28] Rice v. Ill. Cent. R. Co., 22 Ill. App. 643; Flint & P. M. R. Co. v. Wier, 37 Mich. 111, 26 Am. Rep. 499.

[29] Elliott R. R. (2d ed.), § 1615; Muldoon v. Seattle &c. R. Co., 10 Wash 311, 38 Pac. 995, 22 L. R. A. 794, 45 Am. St. 787.

[30] The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. 597. See cases cited in note 153; Elliott R. R. (2d ed.), § 1501.

[31] Harmon v. Jensen, 176 Fed. 519, 20 Am. & Eng. Ann. Cas. 1224; Harp v. Southern R. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. 212; Brown v. Eastern R. Co., 11 Cush. (Mass.) 97; French v. Merchants' Transp. Co., 199 Mass. 433, 85 N. E. 424, 19 L. R. A. (N. S.) 1006n, 127 Am. St. 506. See cases cited in note 29, § 298. See contra cases cited in note 61, § 278. Provision in railroad ticket that in case of dispute between passenger and conductor as to right of transportation under it, passenger must pay fare and apply to company for redress is invalid, because unreasonable. Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830.

[32] Pittsburg &c. R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081n; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627, and cases cited in note 213.

forbidden by statute,[33] employés of circus trains,[34] or news agents,[35] or sleeping car employés,[36] but not in the case of mail agents.[37] The carrier may enter into a contract with an insurance company indemnifying him against loss sustained by his negligence, without contravening public policy.[38]

§ 288. Termination of the relation of carrier and passenger.—Once entered into, the relation of carrier and passenger continues until terminated by the voluntary act of the passenger, or the act of the carrier under circumstances justifying termination. At the end of the journey the relation usually continues until the passenger has had a reasonable time and opportunity to depart from the conveyance, and to avoid further danger from the operation of the conveyance, and to leave the carrier's premises.[39]

[33] Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; Hosmer v. Old Colony R. Co., 156 Mass. 506, 31 N. E. 652; Robinson v. St. Johnsbury, L. C. R. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249; Peterson v. Chicago &c. R. Co., 119 Wis. 197, 96 N. W. 532, 100 Am. St. 879; forbidden by Kansas statute, Weir v. Roundtree, 173 Fed. 776, 19 Am. & Eng. Ann. Cas. 1204 and note; forbidden by Ky. Constitution and Va. Code, Davis v. Chesapeake &c. R. Co., 122 Ky. 528, 29 Ky. L. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458, 121 Am. St. 481, 12 Am. & Eng. Ann. Cas. 723.

[34] Clough v. Grand Trunk W. R. Co., 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 466; Cleveland &c. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710, note, 12 Am. & Eng. Ann. Cas. 1077.

[35] Griswold v. New York & N. E. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; contra, Starr v. Great Northern R. Co., 67 Minn. 18, 69 N. W. 632; Texas & P. R. Co. v. Fenwick, 34 Tex. Civ. App. 222, 78 S. W. 548.

[36] Denver &c. R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432n; Chicago &c. R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. 187. See cases cited in note 58. Contra, Jones v. St. Louis S. W. Railway Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. 514.

[37] Barker v. Chicago, P. & St. L. R. Co., 243 Ill. 482, 90 N. E. 1057, 26 L. R. A. (N. S.) 1058n, 134 Am. St. 382; Seyboldt v. New York &c. R. Co., 95 N. Y. 562, 47 Am. Rep. 75.

[38] Boston & A. R. Co. v. Mercantile &c. Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Kansas City, M. & B. R. Co. v. Southern R. News Co., 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. Rep. 545.

[39] Note 19 Am. & Eng. Ann. Cas. 1021; Glenn v. Lake Erie & W. R. Co., 165 Ind. 659, 75 N. E. 282, 112 Am. St. 255, 2 L. R. A. (N. S.) 873, 112 Am. St. 255 and note; Chicago, R. I. & P. R. Co. v. Wimmer, 72 Kans. 566, 84 Pac. 378, 4 L. R. A. (N. S.) 140, 7 Am. & Eng. Ann. Cas. 757 and note; Hall v. N. Pac. R. Co., 16 N. Dak. 60, 111 N. W. 609, 14 Am. & Eng. Ann. Cas. 960 and note. It terminates with safe and sufficient egress from depot grounds. Alabama Great Northern R. Co. v. Godfrey, 156 Ala. 202, 47 So. 185, 130 Am. St. 76; Melton v. Birmingham R. &c. Co., 153 Ala. 95, 45 So. 151, 16 L. R. A. (N. S.) 467; Fremont, E. & M. V. R. Co. v. Hagblad, 72 Nebr. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254; Berryman v. Penna. R. Co., 228 Pa. 621, 77 Atl. 1011, 30 L. R. A. (N. S.) 1049.

If the passenger delays after a reasonable time has been given, the carrier is no longer liable for his safety.[40]

§ 289. **Duty to stop at stations, to announce stations, to conform with schedules, and to give passenger proper instructions.**—It is the duty of the carrier to stop at the passenger's destination, if he has sold him a ticket to stop at a certain station.[41] This will not apply if the ticket is not good on the train which the passenger has boarded, or it does not stop at such station, and the passenger was negligent in failing to ascertain such fact,[42] but if the ticket was received without objection or warning, it is held that the train must stop.[43] If the train stops at the destination only upon signal, it is the duty of the passenger to notify the carrier's servants in time.[44]

The carrier must stop at the usual place of discharge, and must provide reasonably safe accommodations, a safe place to alight being implied in the contract,[45] and wait until the passenger has had reasonable opportunity to alight in safety.[46] The carrier is liable for taking the passenger beyond his destination,[47] and it is the carrier's duty, embraced in the contract, to announce sta-

[40] Glenn v. Lake Erie R. Co., 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 112 Am. St. 255.

[41] See cases cited in note 6 Am. & Eng. Ann. Cas. 25; South &c. R. Co. v. Hoffman, 76 Ala. 492; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 Am. & Eng. Ann. Cas. 770, revg. 80 S. W. 426. But a passenger who boards a street-car without inquiry cannot rely upon a sign on the car indicating its destination as creating a contract to take him to such place. O'Connor v. Halifax Transp. Co., 37 Can. Sup. 523, 3 Am. & Eng. Ann. Cas. 1075.

[42] Cases cited, 6 Am. & Eng. Ann. Cas. 26; Sira v. Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. 386; Richmond, F. & P. R. Co. v. Ashly, 79 Va. 130, 52 Am. Rep. 620.

[43] Hutchinson v. Southern R. Co., 140 N. Car. 123, 52 S. E. 263, 6 Am. & Eng. Ann. Cas. 22. See McDonald v. Central R. Co., 72 N. J. L. 280, 62 Atl. 405, 2 L. R. A. (N. S.) 505n, 111 Am. St. 672.

[44] Central of Ga. R. Co. v. Dorsey, 106 Ga. 826, 32 S. E. 873; Gulf &c. R. Co. v. Ryan, 4 Tex. App. Civ. Cas. 305, 18 S. W. 866. Contra, San Antonio &c. R. Co. v. Dykes (Tex. Civ. App.), 45 S. W. 758.

[45] Elliott R. R. (2d ed.), §§ 1590, 1627a; McGovern v. Interurban R. Co., 136 Iowa 131, 111 N. W. 412, 125 Am. St. 215; Besecker v. Delaware &c. R. Co., 220 Pa. St. 507, 69 Atl. 1039, 123 Am. St. 714.

[46] Georgianna Topp v. United Rys. &c. Co., 99 Md. 630, 59 Atl. 52, 1 Am. & Eng. Ann. Cas. 913 and note. Where a train runs past a station for purposes of the company, it is the company's duty to inform the passengers of its intention to return and offer them an opportunity to alight. Natchez, C. & M. R. Co. v. Lambert (Miss.), 54 So. 836, 37 L. R. A. (N. S.) 264 and note. Carrier must allow passengers sufficient time to alight. Chicago, B. & Q. R. Co. v. Lampman, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A. (N. S.) 217n, Ann. Cas. 1912C. 788 and note.

[47] Dalton v. Kansas City F. S. & M.

tions.[48] The passenger is entitled only to the usual notice of the approach to the station, and any promise to give special notice, as to awaken a sleeping passenger,[49] is beyond the authority of the servants to bind the carrier. The carrier is liable for unreasonable delay in the performance of the contract, if caused by his negligence,[50] but if caused by the elements, is not.[51] A carrier must use due diligence to conform to its schedules and time tables which it holds out to the public, but is ordinarily bound only to use reasonable diligence and reasonable speed in carrying out this part of its contract.[52] It is the carrier's duty to give to the passenger such instructions and information as are reasonably necessary to enable him to pursue his journey without undue danger or delay, and the passenger has a right to rely upon such instructions;[53] for instance, a railroad company may be liable for the act of a ticket agent in misdirecting a passenger who asks him the best route from one station to another.[54]

R. Co., 78 Kans. 232, 96 Pac. 475, 17 L. R. A. (N. S.) 1226n, 16 Am. & Eng. Ann. Cas. 185 and note.

[48] Seaboard Airline R. v. Rainey, 122 Ga. 307, 50 S. E. 88, 106 Am. St. 134, 2 Am. & Eng. Ann. Cas. 675; Campbell v. Seaboard Airline R., 83 S. Car. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056n, 137 Am. St. 824. See Natchez, J. & C. R. Co. v. Lambert, 70 Miss. 779, 13 So. 33. See Texas, N. O. R. Co. v. Richardson (Tex. Civ. App.), 143 S. W. 722. Failure to announce a station is not a ground of liability where a passenger is possessed of all the knowledge which would be imparted by the announcement. Chicago, B. & Q. R. Co. v. Lampman, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A. (N. S.) 217n, Ann. Cas. 1912C. 788.

[49] Seaboard Airline Ry. v. Rainey, 122 Ga. 307, 50 S. E. 88, 106 Am. St. 134; Sevier v. Vicksburg &c. R. Co., 61 Miss. 8.

[50] See Black v. Charleston & W. C. R. Co., 82 S. Car. 241, 69 S. E. 230, 31 L. R. A. (N. S.) 1184, holding that the statute forbidding railroad employés to work more than sixteen hours consecutively is no defense where carrier's negligence caused the need of such work. See cases cited under note 52, post; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474.

[51] Cormack v. New York, N. H. & H. R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209n, 17 Am. & Eng. Ann. Cas. 949 and note.

[52] Wilsey v. Louisville &c. R. Co., 83 Ky. 511, 7 Ky. L. 498; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Coleman v. Southern R. Co., 138 N. Car. 351, 50 S. E. 690.

[53] Louisville &c. R. Co. v. Cook, 12 Ind. App. 109, 38 N. E. 1104; Newcomb v. New York Cent. &c. R. Co., 182 Mo. 687, 81 S. W. 1069; Duinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611; Barker v. New York Cent. R. Co., 24 N. Y. 599; Hunter v. Southern R. Co., 90 S. Car. 507, 73 S. E. 1017. A carrier must, upon request made to its employes, give notice to a passenger holding a through ticket of a place where change of trains must be made, and is liable for carrying her past such place because of failure to give her the requested information. Lilly v. St. Louis &c. R. Co. (Okla.), 122 Pac. 502, 39 L. R. A. (N. S.) 663 and note.

[54] Southern R. Co. v. Nowlin, 156 Ala. 222, 47 So. 180, 130 Am. St. 91;

§ 290. Sleeping and parlor-car companies.—Sleeping and parlor-car companies are held to be neither common carriers nor innkeepers.[55] They do not undertake to carry passengers, but assume a special duty to furnish additional accommodations, beyond those reasonable accommodations which it is the duty of the railroad carrier of passengers to furnish, and for such additional accommodations they receive a compensation. They have nothing to do with the operation of the train or the road. They do not hold themselves out as offering accommodations to all who may desire them, as public carriers do, yet they are affected with a public interest, and are under a duty to serve all impartially who apply to them, and to exercise reasonable care to furnish the required service.[56] Their liability is only for negligence, and they are held only to ordinary or reasonable care for the protection of the passenger, and for a reasonable and usual amount of baggage,[57] and are only liable for the passenger's effects so far as they can be considered baggage.[58] The railroad company is, however, liable as a common carrier to the occupant of the sleeping car while he is riding in it, under a duty to use the highest practical degree of care to carry him safely and comfortably, and may be held liable for the acts of the servants of the sleeping car company in regard to that duty.[59] A sleeping car company is under a duty to furnish a berth to a person who has a proper railroad ticket, and at the proper time and place tenders the com-

Cincinnati &c. R. Co. v. Raue, 130 Ky. 454, 113 S. W. 495, 132 Am. St. 400. But see McKinley v. Louisville &c. R. Co. (Ky.), 127 S. W. 483, 28 L. R. A. (N. S.) 611; St. Louis Southwestern R. Co. v. White, 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110, 13 Am. & Eng. Ann. Cas. 965 and note.

[55] Elliott R. R. (2d ed.), § 1616; Pullman Palace Car Co. v. Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. 293; Lewis v. New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Blum v. Southern Pullman Car Co., III Cent. Law Journal 591, 22 Int. Rev. Rec. 305.

[56] Searles v. Mann &c. Co., 45 Fed. 330; Nevin v. Pullman &c. Co., 106 Ill. 222, 4 Ky. L. 926, 46 Am. Rep. 688, 11 Am. & Eng. R. Cas. 92.

[57] Pullman Co. v. Green, 128 Ga. 142, 57 S. E. 233, 119 Am. St. 368, 10 Am. & Eng. Ann. Cas. 893 and note; Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407n.

[58] Bacon v. Pullman Co., 16 L. R. A. (N. S.) 578, 159 Fed. 1, 14 Am. & Eng. Ann. Cas. 516; Godfrey v. Pullman Co., 87 S. Car. 361, 69 S. E. 666, Ann. Cas. 1912B. 971.

[59] Louisville & Nashville R. Co. v. Church, 155 Ala. 329, 46 So. 457, 130 Am. St. 29n; Taber v. Seaboard Airline Ry., 84 S. Car. 291, 66 S. E. 292, 19 Am. & Eng. Ann. Cas. 1132 and note; Campbell v. Seaboard Airline R. Co., 83 S. Car. 448, 65 S. E. 628,

pensation.[60] It may orally contract to reserve a berth, is liable on such a contract,[61] and is not liable for a failure to give a berth so reserved to one who applies for it before the one who first applied has paid for it.[62] It is the company's duty not only to provide the bed, but also to furnish suitable means of getting into and out of the berth,[63] to ventilate and heat the cars,[64] and to awaken the passenger in time to properly prepare to leave the train at his destination,[65] such being essentially a part of the contract.

§ 291. **Sleeping-car tickets.**—It is usually held that the sleeping-car ticket does not fully express the contract, and may be added to by parol,[66] but it seems that the passenger who buys the right to a certain berth cannot rightly claim any other.[67] A sleeping-car company cannot contract against its own negligence, but in reference to property of passengers it may contract, or make reasonable rules and regulations for its disposition, and it seems that a contract relieving the company from liability unless the passengers put their property in certain designated places provided therefor is valid, and if there is a regulation to such effect which is brought to the knowledge of the passenger, he is bound by it.[68] A railroad company may itself furnish sleeping-

137 Am. St. 824; Nashville, C. & St. L. R. Co. v. Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. 947; See Elliott R. R. (2d ed.), § 1625.

[60] Searles v. Mann Boudoir Car. Co., 45 Fed. 330; Nevin v. Pullman &c. Car. Co., 106 Ill. 222, 4 Ky. L. 926, 46 Am. Rep. 688; Pullman Car. Co. v. Lee, 49 Ill. App. 75; Lawrence v. Pullman Palace Car. Co., 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58, 28 Am. & Eng. Ann. Cas. 151.

[61] Braun v. Webb, 32 Misc. (N. Y.) 243, 65 N. Y. S. 668; Pullman Palace Car Co. v. Booth (Tex. Civ. App.), 28 S. W. 719; Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624.

[62] Searles v. Mann Boudoir Car Co., 45 Fed. 330.

[63] Pullman Palace Car Co. v. Fielding, 62 Ill. App. 577.

[64] Hughes v. Pullman &c. Co., 74 Fed. 499. See Edmaundson v. Pullman Palace Car Co., 92 Fed. 824, 34 C. C. A. 382.

[65] Pullman Car Co. v. Lutz, 154 Ala. 517, 45 So. 675, 14 L. R. A. (N. S.) 907n, 129 Am. St. 67; Airey v. Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512; McKeon v. Chicago &c. Ry. Co., 94 Wis. 477, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. 910.

[66] Mann Boudoir Car Co. v. Dupre, 54 Fed. 646, 21 L. R. A. 289; Lewis v. New York &c. Co., 143 Mass. 267, 9 N. E. 615.

[67] Searles v. Mann Boudoir Car Co., 45 Fed. 330; Pullman Palace Car Co. v. Taylor, 65 Md. 153, 32 Am. Rep. 57; Pullman Palace Car Co. v. Marsh, 24 Ind. App. 129, 53 N. E. 782; Pullman Co. v. Willett, 27 Ohio C. C. 649; Pullman Palace Car Co. v. Bales, 80 Tex. 211, 15 S. W. 785.

[68] Elliott R. R. (2d ed.), § 1627; Watkins v. Rymill, L. R. 10 Q. B. Div. 178; Blum v. Southern R. Co., 3

cars or parlor cars, and demand additional compensation for their use as additional accommodations.[69]

§ 292. **Carriers of passengers by water.**—The general rules applicable to the carrier of passengers by land are applicable in the main to the passenger carrier by water.[70] The duties are modified in general only by the differences caused by the means and manner of transportation, but, in addition, there are in this country a great many federal statutes for the regulation and licensing of steam vessels, their engineers, masters and pilots, and providing for the safety and accommodation of passengers, but which in no way lessen the common-law liability of the carrier.[71] There is an especial duty upon the water carrier to furnish sufficient and proper food for the passengers,[72] and bedding and sleeping accommodations to all passengers on a ship except those in the steerage.[73] The master of a ship is in a position such that he has a great authority over a passenger, such authority, however, not extending beyond the reasonable necessities of the circumstances.

§ 293. **Liability for baggage of passengers.**—The carrier of passengers is liable as a common carrier of goods for the carriage of the ordinary and reasonable baggage of one who is a passenger upon consideration, being an insurer of safety except for loss caused by the act of God, the public enemy, or the fault of the passenger,[74] the compensation paid for fare being the con-

Cent. L. J. 591; Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258.

[69] St. Louis &c. R. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711.

[70] Northwestern Steamship Co., Limited, v. Ransom, 174 Fed. 913, 20 Am. & Eng. Ann. Cas. 1015 and note; Simmons v. New Bedford &c. Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282.

[71] Thomp.-Neg., § 6452.

[72] The Oregon, 133 Fed. 609, 68 C. C. A. 603; The European, 120 Fed. 776, 57 C. C. A. 140; The D. C. Murray, 89 Fed. 508; Defrier v. The Nicaragua, 81 Fed. 745.

[73] The Oriflamme, 3 Sawy. (U. S.) 397, 18 Fed. Cas. 10, 572; The Centennial, 131 Fed. 816; Defrier v. The Nicaragua, 81 Fed. 745. And the carrier must sell berths without discrimination, Patterson v. Old Dominion S. S. Co., 140 N. Car. 412, 53 S. E. 224, 5 L. R. A. (N. S.) 1012, 111 Am. St. 848.

[74] Wood v. Maine Central R. Co., 98 Maine 98, 56 Atl. 457, 99 Am. St. 339. See very full monographic note on subject of liability of carriers for the baggage of passengers, 99 Am. St. 343 et seq; Adger v. Blue Ridge R. Co., 71 S. Car. 213, 50 S. E. 783, 110 Am. St. 568, Elliott R. R. (2d ed.), § 1651; Dibble v. Brown, 12 Ga 217, 56 Am. Dec. 460; Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 6 L. R. A.

sideration for the carriage of baggage also.[75] The liability as common carrier begins at the time of delivery for transportation, if not unreasonably long before the intended time of departure,[76] and continues until the baggage has been transported to its destination, and the owner has been given a reasonable time and opportunity to claim it and take it away.[77] Sometimes liability for baggage begins before the purchase of a ticket, or before the owner becomes a passenger, if the owner intends in good faith to make the journey, and delivers the baggage a reasonable time before,[78] and it is not always necessary that the person should make the proposed journey,[79] for instance, if he is prevented by the fault of the carrier, and the baggage is destroyed before the beginning of the journey.[80] There is a delivery where baggage is placed in possession of the carrier's agent, and is accepted for transportation by him, or by deposit at the usual place, notice being given to the agent, who assents, but it is not sufficient to deposit without notice unless usage may make the carrier liable, nor is a carrier who accepts a baggage check liable until actual possession is obtained from another carrier.[81] When baggage has been held for a reasonable time upon arrival at its destination and

483, 20 Am. St. 333; Camden & A. R. & Transp. Co. v. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

[75] Strouss v. Wabash &c. R. Co., 17 Fed. 209; Wood v. Maine Central R. Co., 98 Maine 98, 56 Atl. 457, 99 Am. St. 339; Long v. Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. 732.

[76] Lake Shore & M. S. R. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Fitchburg & W. R. Co. v. Hanna, 6 Gray (Mass.) 539, 66 Am. Dec. 427; Illinois Central R. Co. v. Tronstine, 64 Miss. 834, 2 So. 255, 31 Am. & Eng. R. Cas. 99.

[77] Toledo, St. L. & K. C. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Mote v. Chicago & N. W. R. Co., 27 Iowa 22, 1 Am. Rep. 212; Dininny v. New York & New Haven R. Co., 49 N. Y. 546; Hoeger v. Chicago, M. & St. P. R. Co., 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271; note, 99 Am. St. 376.

[78] Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Lake Shore &c. R. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Green v. Milwaukee &c. R. Co., 41 Iowa 410.

[79] Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Camden & A. R. & Transp. Co. v. Belknap, 21 Wend. (N. Y.) 354; Goldberg v. Ahnapee & W. R. Co., 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. 899. Delivery of a trunk the night before by one who intends taking a morning train is not made at an unreasonable time. Cone v. Southern R. Co., 85 S. Car. 524, 67 S. E. 779, 21 Am. & Eng. Ann. Cas. 158. See note 14 Am. & Eng. Ann. Cas. 912.

[80] Green v. Milwaukee & St. P. R. Co., 41 Iowa 410; Wood v. Maine Central R. Co., 98 Maine 98, 56 Atl. 457, 99 Am. St. 339.

[81] Southern R. Co. v. Bickley, 119 Tenn. 528, 107 S. W. 680, 14 L. R. A. (N. S.) 859n, 123 Am. St. 754, 14 Am. & Eng. Ann. Cas. 910.

opportunity has been given to take it away, the liability as carrier ends, and thenceforward that of warehouseman for hire exists.[82] If the passenger is carried free, the liability for his baggage is only that of a gratuitous bailee, that is, for gross negligence,[83] and the liability is usually the same if the passenger does not make the journey he intends, and does not in fact accompany the baggage.[84]

§ 294. What is baggage.—It is difficult to define this term. In Elliott on Railroads it is said, "In its broadest sense it denotes those things which a passenger takes with him on his journey, either for his use while in transit or to accomplish the ultimate purpose of his journey, and may include not only things taken for the personal convenience of the passenger, but also merchandise knowingly received and carried along with the passenger as baggage. In its strictest sense it may be defined as meaning those things which passengers of the same class usually or fittingly carry with them for their personal use or convenience on similar journeys."[85] Another definition is " 'Baggage' means such goods and chattels as the convenience, or comfort (A), the taste (B), the pleasure (C), or the protection (D), of passengers generally (E) makes it fit and proper for the passenger in question to take with him for his personal use (F), according to the habits or wants of the class to which he belongs (G), either with reference to the period of the transit or the ultimate purpose of the journey (H)."[86]

§ 295. Personal baggage.—Personal baggage includes in a broad sense those articles which are carried for personal use and convenience on the journey, or perhaps for a member of the

[82] Elliott R. R. (2d ed.), § 1652; Central of Ga. R. Co. v. Jones, 150 Ala. 379, 43 So. 575, 124 Am. St. 71; Laffrey v. Gummond, 74 Mich. 186, 41 N. W. 894, 3 L. R. A. 287, 16 Am. St. 624; Tallman v. Chicago, M. & St. P. R. Co., 136 Wis. 648, 118 N. W. 205, 16 Am. & Eng. Ann. Cas. 711 and note.

[83] See cases cited in note 28, § 296; Flint & P. M. R. Co. v. Wier, 37 Mich. 111, 26 Am. Rep. 499. As to liability of carrier for baggage checked on a free pass, see Denver & R. G. R. Co. v. Johnson, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C. 627 and note.

[84] Wood v. Maine Central R. Co., 98 Maine 98, 56 Atl. 457, 99 Am. St. 339n.

[85] Elliott R. R. (2d ed.), § 1646.

[86] "A legal definition of baggage," 38 Cent. L. J. 5, 6.

passenger's family, and during the stay at the place to which he is going.[87] It must usually be a question of fact as to what articles may be included in this definition, taking into consideration the station in life of the passenger,[88] the duration of the journey, the length of stay contemplated at the destination, and the purpose of the journey,[89] his business,[90] the sex of the passenger, and perhaps peculiarities in his personal circumstances.[91] Articles necessary for a temporary stay at a particular place are baggage.[92] It is held that the test is what is usually carried as baggage, but this rule does not apply in all cases.[93] Under some circumstances, one may carry as baggage the goods of another with whom he is traveling.[94] In the notes will be found a catalogue of articles which have been considered baggage, either generally, or under the particular circumstances of the case,[95] also

[87] Elliott R. R. (2d ed.), § 1647; Hawkins v. Hoffman, 6 Hill. (N. Y.) 586, 41 Am. Dec. 767n; New York Cent. & Hudson River R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531.

[88] Macrow v. Great Western R. Co., L. R. 6 Q. B. 612; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460; New York Cent. &c. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531.

[89] Hannibal R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423; Merrill v. Grinnell, 30 N. Y. 594.

[90] Kansas City & Ft. S. & G. R. Co. v. Morrison, 34 Kans. 502, 9 Pac. 225, 55 Am. Rep. 252; Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

[91] Chicago, Rock Island & Pac. R. Co. v. Whitten, 90 Ark. 462, 119 S. W. 835, 21 Am. & Eng. Ann. Cas. 726 and note on what is baggage.

[92] Toledo, Wabash & Western R. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221; Dexter v. Syracuse, B. & N. Y. R. Co., 42 N. Y. 326, 1 Am. Rep. 527; Texas & N. O. R. Co. v. Lawrence, 42 Tex. Civ. App. 318, 95 S. W. 663.

[93] Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460.

[94] Brick v. Atlantic Coast Line R. Co., 145 N. Car. 203, 58 S. E. 1073, 122 Am. St. 440.

[95] Among things which have been held personal baggage are a reasonable amount of money for the purposes of the journey (St. Louis S. W. R. Co. v. Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. 212; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460; Hutchings v. Western R. Co., 25 Ga. 61, 71 Am. Dec. 156; Baltimore Steam Packet Co. v. Smith, 23 Md. 402, 87 Am. Dec. 575; Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44; Runyan v. Central R. Co. of N. J., 61 N. J. L. 537, 41 Atl. 367, 68 Am. St. 711; Fairfax v. New York Cent. &c. R. Co., 73 N. Y. 167, 29 Am. Rep. 119); jewelry and ornaments to be worn on the person (Godfrey v. Pullman Co., 87 S. Car. 361, 69 S. E. 666, Ann. Cas. 1912B 971; Coward v. East Tennessee &c. R. Co., 16 Lea (Tenn.) 225, 57 Am. Rep. 227; New York Cent. &c. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531); firearms for sportsmen (Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. 53; Davis v. Michigan Southern &c. R. Co., 22 Ill. 278, 74 Am. Dec. 151); and fishing tackle of sportsmen (Macrow v. Great Western R. Co., L. R. 6 Q. B. 612); manuscript notebooks of a student, necessary in his studies (Hopkins v. Wescott, 6 Blatchf. (U. S.) 64, Fed. Cas. No. 6692); a reasonable number of tools of a mechanic (Davis v. The Cayuga & Susquehanna R. Co., 10 How. Pr. (N. Y.) 330; Porter v.

of those which have been held not to be baggage.[96]

§ 296. Merchandise carried as baggage.—If merchandise is carried with baggage, as the samples of a traveling man,[97]

Hildebrand, 14 Pa. St. 129); traveling salesman's price list (Staub v. Kendrick, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619n; Gleason v. Goodrich Transp. Co., 32 Wis. 85); opera glasses (Toledo & W. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221); books for amusement and entertainment (Doyle v. Kiser, 6 Ind. 242); camera (Atwood v. Mohler, 108 Ill. App. 416); telescope (Cadwallader v. Grand Trunk R. Co., 9 L. Canada 169); gold spectacles (Newb. Admr. (U. S.) 494); stage costumes knowingly accepted (Cakes v. Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. 126); carpet (Minter v. Pacific R. Co., 41 Mo. 503, 97 Am. Dec. 288); a watch, when it is carried in a trunk (McCormick v. Hudson River R. Co., 4 E. D. Smith 181); a nurse's record book (Werner v. Evans, 94 Ill. App. 328); a surgeon's instruments (Hannibal &c R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423); dresses and material for dresses for members of one's family (Dexter v. Syracuse &c. R. Co., 42 N. Y. 326, 1 Am. Rep. 527); pistols for protection (Woods v. Devin 13 Ill. 746, 56 Am. Dec. 483); bedding of a poor man moving with his family (Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646); a hunting dog (Kansas City &c. R. Co. v. Higdon, 94 Ala. 286, 10 So. 282, 14 L. R. A. 515, 33 Am. St. 119); a large quantity of lace belonging to women of rank (Fraloff v. New York Cent. &c. R. Co., 10 Blatchf. (U. S.) 16, Fed. Cas. No. 5025); a small piece of ice wrapped so as not to drip (McIntosh v. Augusta &c. R. Co., 87 S. Car. 181, 69 S. E. 159, 80 L. R. A. (N. S.) 889); barber's tools (Grzywacz v. New York Cent. & H. R. R. Co., 134 N. Y. S. 209). See note in 21 L. R. A. (N. S.) 850, as to whether articles intended for gifts are baggage.

[96] The following are not baggage: More money than is reasonably sufficient for journey (Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Levins v. New York N. H. & H. R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. 434); jewelry not to be worn by the passenger (Michigan Cent. R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248; The Ionic, 5 Blatchf. (U. S.) 538); bedding and household furniture not to be used on journey (Mauritz v. New York, L. E. & W. R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286); silver knives, forks and spoons (Files v. Fauntleroy, 13 Md. 126; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129); a sacque, muff and silver napkin rings carried by a man (Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510, 24 Am. Rep. 268); deeds and valuable documents (Phelps v. London &c. R. Co., 19 C. B. (N. S.) 321); an artist's pencil sketches (Mytton v. Midland R. Co., 28 L. J. Exch. 385); a hobby horse (Hudston v. Midland R. Co., L. R. 4 Q. B. 366, 38 L. J. R. (Q. B.) 213); dogs (Honeyman v. Oregon &c. R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20n); masquerade costumes (Michigan &c. R. Co. v. Oehm, 56 Ill. 293); a silk bed quilt carried in a lady's trunk (St. Louis & Cairo R. Co. v. Hardway, 17 Ill. App. 321); ladies' jewelry carried by a man (Metz v. California So. R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431n, 20 Am. St. 228, 44 Am. & Eng. R. Cas. 433); a concertina (Bruty v. Grand Trunk R. Co., 32 U. C. Q. B. 66); handcuffs (Bomar v. Maxwell, 9 Humph. (Tenn.) 621, 51 Am. Dec. 682); fruit and groceries (Georgia R. Co. v. Johnson, 113 Ga. 589, 38 S. E. 954); Masonic regalia (Nevins v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225); a bicycle (Britten v. The Great Northern Railway (1899) 1 Q. B. 243, 68 L. J. Q. B. 75; State v. Missouri Pac. R. Co., 71 Mo. App. 385), bed linen of parties moving, St. Louis &c. R. Co. v. Miller (Ark.), 145 S. W. 889, 39 L. R. A. (N. S.) 634, and see note as to when household supplies are baggage.

[97] New Orleans & N. E. R. Co. v. Shackelford, 87 Miss. 610, 40 So.

jewelry of a traveling jewelry agent, [98] merchandise purchased and carried home as such,[99] or articles of any kind carried for sale,[1] the carrier is not ordinarily liable for them as baggage, unless they have been accepted as such with knowledge.[2] Where a trunk contains both personal baggage and merchandise, the carrier without notice is liable only for the personal baggage.[3] Ordinarily the carrier may assume that a trunk contains only personal baggage,[4] and it is held that if it contains merchandise, it is a fraud on the carrier to fail to disclose such a fact,[5] though this was an extreme case, and, on the other hand, it has been held that the carrier may get notice by observing the obvious character of baggage,[6] as well as by information from the passenger, and the carrier which by its baggage master or other agent knowingly accepts merchandise, or other articles not ordinarily carried as baggage, even without extra compensation, is liable as for personal baggage.[7] Also many valuable goods, such as traveling men's samples, are often carried as baggage for a compensation aside from that paid

427, 4 L. R. A. (N. S.) 1035, 112 Am. St. 461, 6 Am. & Eng. Ann. Cas. 826.

[98] Humphreys v. Perry, 148 U. S. 627, 37 Fed. 587, 13 Sup. Ct. 711, 54 Am. & Eng. R. Cas. 29.

[99] Illinois Cent. R. Co. v. Matthews, 114 Ky. 973, 24 Ky. L. 1766, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. 316.

[1] Brick v. Atlantic Coast Line R. Co., 145 N. Car. 203, 58 S. E. 1073, 122 Am. St. 440.

[2] Illinois Cent. &c. R. Co. v. Mathews, 114 Ky. 973, 24 Ky. L. 1766, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. 316; New Orleans & N. E. R. Co. v. Shackelford, 87 Miss. 610, 40 So. 427, 4 L. R. A. (N. S.) 1035, 6 Am. & Eng. Ann. Cas. 826; Wells v. Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818. See also, St. Louis &c. R. Co v. Miller (Ark.), 145 S. W. 889, 39 L. R. A. (N. S.) 634.

[3] Simpson v. New York, N. H. & H. R. Co., 16 Misc. (N. Y.) 613, 73 N. Y. St. 812, 38 N. Y. S. 341; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. 711, 54 Am. & Eng. R. Cas. 29.

[4] Haines v. Chicago, St. P. M. & O. R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. 711, 54 Am. & Eng. R. Cas. 29.

[5] Brick v. Atlantic Coast Line R. Co., 145 N. Car. 203, 58 S. E. 1073, 122 Am. St. 440.

[6] 3 Thomps. Neg. (2d ed.), § 3403; Kansas City &c. R. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781n, 58 Am. St. 111; Trimble v. New York Cent. &c. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115.

[7] Bergstrom v. Chicago, R. I. & P. R. Co., 134 Iowa 223, 111 N. W. 818, 13 Am. & Eng. Ann. Cas. 239; McKibbin v. Wisconsin Cent. R. Co., 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. 689. See St. Louis, I. M. & S. R. Co. v. Miller (Ark), 145 S. W. 889.

for the passenger's ticket, and as to such the carrier is an insurer.[8]

§ 297. Limitation of liability for baggage.—Railroad carriers may limit the amount of baggage which they will carry for each passenger,[9] and for any overweight, they may contract for separate compensation.[10] Where an infant travels with its parent without payment of fare, the infant's baggage is held to be carried as a part of the parent's baggage for which the carrier is held liable.[11] To render the carrier liable, there must be a delivery and acceptance, and the general rules applicable to delivery and acceptance by carriers of goods apply to delivery and acceptance of baggage.[12] If one carries with him as baggage the property of another not traveling with him or a member of his family, the carrier is liable only as gratuitous bailee.[13] Where the passenger retains custody of the baggage, the carrier is as a rule not liable unless loss or damage has been caused by its negligence.[14]

§ 298. Baggage checks and limitation of liability by ticket.—Baggage checks are held, by the weight of authority, to be mere tokens evidencing the receipt of the baggage by the carrier, not embodying the contract to carry the baggage.[15] The contract to carry the passenger is a contract to carry his baggage also. The

[8] Millard v. Missouri &c. R. Co., 86 N. Y. 411, 6 Am. & Eng. R. Cas. 311; Talcott v. Wabash R. Co., 159 N. Y. 461, 54 N. E. 1; Oakes v. Northern Pac. R. Co., 20 Ore. 39, 26 Pac. 230, 23 Am. St. 126.

[9] New York Cent. &c. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Norfolk &c. R. Co. v. Irvine, 84 Va. 553, 5 S. E. 532.

[10] Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460; Gulf &c. R. Co. v. Ions, 3 Tex. Civ. App. 619, 22 S. W. 1011.

[11] Withey v. Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773, 1 L. R. A. (N. S.) 352n, 113 Am. St. 533, 12 Det. Leg N. 511, 7 Am. & Eng. Ann. Cas. 57.

[12] See cases cited in notes 79 and 81, § 293, and supra, delivery to carriers of goods, §§ 130-139.

[13] Brick v. Atlantic Coast Line R. Co., 145 N. Car. 203, 58 S E. 1073, 122 Am. St. 440.

[14] Elliott R. R. (2d ed.), § 1654; Kerr v. Grand Trunk R. Co., 24 U. C. C. P. 209; Tower v. Utica R. Co., 7 Hill (N. Y.) 47, 42 Am. Dec. 36; Carpenter v. New York, N. H. & H. R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. 644; The R. E. Lee, 2 Abb. (U. S.) 49. See note Ann. Cas. 1912D. 1156. The carrier is liable for the theft of handbaggage by a trainman to whom it is temporarily delivered while acting in the scope of his employment in assisting the passenger to alight. Hasbrouck v. New York Central &c. R. Co., 202 N. Y. 363, 95 N. E. 808, Ann. Cas. 1912D. 1151.

[15] Elliott R. R. (2d ed.), § 1655; Hickox v. Naugatuck R. Co., 31

possession of the check is prima facie evidence that the baggage has been received by the carrier,[16] and that the holder is entitled to receive it,[17] but such evidence is not conclusive, and may be explained.[18] The implied contract is that the baggage shall be transported on the same train with the passenger, and the carrier may be liable for failure to do so if the baggage was delivered in proper season.[19] If received after the train left, it has been held to be carried as freight for a separate compensation,[20] but if the company receives it in ample time, and fails to send it on the train with the passenger, it must transport it on a subsequent train as baggage.[21] If the carrier contracts absolutely to transport the baggage at all events, it must use the required degree of care upon whatever train it is.[22] If the passenger stops off, and the baggage is carried ahead, the liability for its care during the remainder of the journey has been held to be merely that of a gratuitous bailee.[23]

Conn. 281, 83 Am. Dec. 143; Chicago, R. I. & P. R. Co. v. Clayton, 78 Ill. 616; Ahlbeck v. St. Paul &c. R. Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. 661; Griffith v. Atchison &c. R. Co., 114 Mo. App. 590, 90 S. W. 408.

[16] Davis v. Michigan Southern &c. R. Co., 22 Ill. 278, 74 Am. Dec. 151; Dill v. South Carolina R. Co., 7 Rich. L. (S. Car.) 158, 62 Am. Dec. 407; Louisville &c. R. Co. v. Weaver, 77 Tenn. 38, 42 Am. Rep. 654.

[17] St. Louis, I. M. & S. R. Co. v. Stone, 78 Ark. 318, 95 S. W. 470; Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749.

[18] Chicago, R. I. & P. R. Co. v. Clayton, 78 Ill. 616; Davis v. Michigan &c. R. Co., 22 Ill. 278, 74 Am. Dec. 151; Southern R. Co. v. Bickley, 119 Tenn. 528, 107 S. W. 680, 14 L. R. A. (N. S.) 859n, 123 Am. St. 754, 14 Am. & Eng. Ann. Cas. 910 and note.

[19] Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Wilson v. Grand Trunk &c. R. Co., 56 Maine 60, 96 Am. Dec. 435; 8 Am. Law Reg. (N. S.) 398; Blumenthal v. Maine Cent. R. Co., 79 Maine 550, 11 Atl. 605, 34 Am. & Eng. R. Cas. 247; Marshall v. Pontiac &c. R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650; Conheim v. Chicago Great Western R. Co., 104 Minn. 312, 116 N. W. 581, 17 L. R. A. (N. S.) 1091, 124 Am. St. 623, 15 Am. & Eng. Ann. Cas. 389.

[20] Wilson v. Grand Trunk R. Co., 56 Maine 60, 96 Am. Dec. 435; Graffam v. Boston & M. R. Co., 67 Maine 234; Collins v. Boston & M. R. Co., 10 Cush. (Mass.) 506.

[21] Warner v. Burlington &c. R. Co., 22 Iowa 166, 92 Am. Dec. 389; Wilson v. Grand Trunk R. Co., 56 Maine 60, 96 Am. Dec. 435.

[22] Warner v. Burlington &c. R. Co., 22 Iowa 166, 92 Am. Dec. 389; Adger v. Blue Ridge R. Co., 71 S. Car. 213, 50 S. E. 783, 110 Am. St. 568; Wilson v. Chasapeake &c. R. Co., 21 Grat. (Va.) 654.

[23] Wood v. Maine Cent. R. Co., 98 Maine 98, 56 Atl. 457, 99 Am. St. 339 (but compare McKibbin v. Wisconsin Cent. R. Co., 100 Minn. 270, 110 N. W. 964); Cutler v. North London Ry., 19 Q. B. Div. 64; compare Laffrey v. Grummond, 74 Mich. 186, 41 N. W. 894, 3 L. R. A. 287, 16 Am. St. 624; Marshall v. Pontiac &c. R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650; Howell v. Grand Trunk R. Co., 92 Hun (N. Y.) 423, 36 N. Y. S. 544.

A railroad company selling a through ticket may contract to limit its liability to loss occurring on its own line,[24] but the company selling a through ticket is liable for loss of baggage on connecting lines in absence of agreement,[25] and the same rule applies if the baggage is checked through.[26] By regulations brought to the notice of passengers, the carrier may limit his liability as insurer to a fixed amount, demanding compensation for carrying and liability as to a larger amount,[27] but some courts hold that the passenger must assent to such a condition on a ticket or check or other notice in order to be bound,[28] though it seems that if the limitation is reasonable and is printed on a ticket which is in form a contract and not merely a token, and given for a reduced rate, such limitation is valid,[29] in the absence of fraud, even if the passenger did not read it or understand it, but did sign the ticket. As to contracting against negligence, opposing views prevail in different jurisdictions as in regard to other carriers of goods.[30]

[24] Peterson v. Chicago, R. I. & P. R. Co., 80 Iowa 92, 45 N. W. 573; Gulf R. Co. v. Ions, 3 Tex. Civ. App. 619, 22 S. W. 1011.

[25] Little Rock &c. R. Co. v. Record, 74 Ark. 125, 85 S. W. 421, 109 Am. St. 67; Kansas City &c R. Co. v. Washington, 74 Ark. 985, 85 S. W. 406, 69 L. R. A. 65, 109 Am. St. 61; Najac v. Boston & Lowell R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686; Talcott v. Wabash R. Co., 66 Hun (N. Y.) 456, 50 N. Y. St. 423, 21 N. Y. S. 318, modified, 159 N. Y. 461, 54 N. E. 1.

[26] Adger v. Blue Ridge R. Co., 71 S. Car. 213, 50 S. E. 783, 110 Am. St. 568; But see Marmonstein v. Pennsylvania R. Co., 13 Misc. (N. Y.) 32, 68 N. Y. St. 172, 34 N. Y. S. 97; Isaacson v. New York Cent. &c. R. Co., 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas. 188.

[27] The Majestic, 56 Fed. 244; Steers v. Liverpool &c. Steamboat Co., 57 N. Y. 1, 15 Am. Rep. 453n; Smith v. N. Carolina R. Co., 64 N. Car. 235; New York Cent. &c. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Gamon v. Oregon, R. & Nav. Co., 52 Wash. 685, 101 Pac. 361, 25 L. R. A. (N. S.) 537.

[28] Weigand v. Central R. Co., 75 Fed. 370, affd. 79 Fed. 991, 25 C. C. A. 681; Baltimore &c. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246. "General liability of carriers of passengers for baggage," 2 Am. & Eng. R. Cas. (N. S.) I., and authorities cited; Little Rock &c. R. Co. v. Record, 74 Ark. 125, 85 S. W. 421, 109 Am. St. 67; Hooker v. Boston & M. R. Co., 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B. 669; Wilson v. Chesapeake &c. R. Co., 21 Grat. (Va.) 654.

[29] See cases cited in note 31, § 287; Elliott R. R. (2d ed.), § 1661; French v. Merchants' & Miners' Transp. Co., 199 Mass. 433, 85 N. E. 424, 19 L. R. A. (N. S.) 1006; Rose v. Northern Pac. R. Co., 35 Mont. 70, 88 Pac. 767, 119 Am. St. 836; Gardiner v. N. Y. Cent. &c. R. Co., 201 N. Y. 387, 94 N. E 876, Ann Cas. 1912B. 281 and note; Tewes v. N. German Lloyd S. S. Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199n, 9 Am. & Eng. Ann. Cas. 909 and note.

[30] A recent case holding that a carrier may not limit his liability against negligence is Wells v. Great Northern R. Co., 59 Ore. 165, 114

§ 299. Carrier's lien on baggage.—The carrier has a lien on the passenger's baggage in its possession for the payment of his fare,[31] and upon baggage left in storage, for warehouse charges,[32] but such lien does not extend to baggage in the passenger's exclusive possession,[33] nor is there a lien upon a passenger's baggage for the payment of the fare of her infant child.[34] A street railway has been held not to be an insurer of baggage carried on it.[35]

Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818, but it is held that though an opportunity to inform the carrier of a larger amount of baggage than the limitation was not given, yet by paying full fare he might have imposed full liability and the limitation was good as against the carrier's negligence. Gardiner v. N. Y. Cent. &c. R. Co., 201 N. Y. 387, 94 N. E. 876, 34 L. R. A. (N. S.) 826.

[31] Elliott R. R. (2d ed.), § 1662; Wolf v. Summers, 2 Camp. 631; Roberts v. Koehler, 30 Fed. 94.

[32] Kressin v. Central R. Co., 103 N. Y. S. 1002.

[33] Ramsden v. Boston & A. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Lynch v. Metropolitan &c. R. Co., 90 N. Y. 77, 43 Am. Rep. 141.

[34] Cantwell v. Terminal R. Assn. &c. Co., 160 Mo. App. 393, 140 S. W. 966.

[35] Sperry v. Consolidated R. Co., 79 Conn. 565, 65 Atl. 962, 10 L. R. A. (N. S.) 907, 118 Am. St. 169, 9 Am. & Eng. Ann. Cas. 199 and note.

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